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Filed 1879 10-2

Submitted Oct. 2, 1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~295.~~ ~~240.~~ 14

FRANK SOULE, CHRISTOPHER C. WEBB, IRA PACKARD RANKIN, JOE. JOHNSON FELT, FREDERICK H. WATERMAN, JAMES DOWS, SAMUEL SOULE, WILLIAM A. DANA, JAMES McM. SHAFTER, JOHN CENTER, HORACE KILHAM, AND SAMUEL BRANNAN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED OCTOBER 29, 1875.



SUPREME COURT OF THE UNITED STATES.

No. 295.

FRANK SOULE, CHRISTOPHER C. WEBB, IRA PACKARD RANKIN, JOE. JOHNSON FELT, FREDERICK H. WATERMAN, JAMES DOWS, SAMUEL SOULE, WILLIAM A. DANA, JAMES McM. SHAFTER, JOHN CENTER, HORACE KILHAM, AND SAMUEL BRANNAN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, ninth judicial circuit, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States of America, plaintiff (defendant in error), and Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, def'ts in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27 day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

The above writ of error is hereby allowed.

[SEAL.]

LORENZO SAWYER,
Circuit Judge.
L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Dep. Clk.

b *The answer of the judges of the circuit court of the United States for the district of California.*

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.]

L. S. B. SAWYER, *Clk,*
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsed:) 1242. United States Supreme Court. Frank Soulé et al., pl'ffs in error, vs. The United States of America, def't in error. Writ of error. Filed April 27, A. D. 1875. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

c UNITED STATES OF AMERICA, *ss:*

To the United States of America, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, wherein Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 27th day of April, A. D. 1875, and of the Independence of the United States the ninety-ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

d I acknowledge and admit that due service of a copy of the within citation was made upon me at San Francisco, California, this 29th day of April, 1875.

WALTER VAN DYKE,
U. S. Att'y.

(Indorsed:) 1242. United States Supreme Court. Frank Soulé et al., pl'ffs in error, vs. The United States of America. Citation. Filed 29 April, 1875. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

1 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States, of the ninth circuit, in and for the district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FRANK SOULÉ ET AL., DEFENDANTS.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America, greeting, to Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, in the office of
2 the clerk of said court in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county, or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover from you the sum of eighteen thousand three hundred and seventy-three $\frac{36}{100}$ ($18,373.36) dollars, for the breach of a certain bond, signed, sealed, and delivered by you, and each of you, to said United States, dated January 12, 1867, conditioned for the true, &c., execution and discharge by said Frank Soule of the duties of the office of collector of internal-revenue taxes for the first collection-district of the State of California, together with lawful interest on said sum of $18,373.36 and costs of suit, and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this sixth day of June, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth.

3 [SEAL.] LORENZO S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:)

OFFICE OF U. S. MARSHAL,
District of California:

I hereby certify that I served the within summons upon Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Frederick Hubbell Waterman, James Dows, Sam. Soulé, James McM. Shafter, John Center, and Samuel Brannan by personally delivering to each of them a true copy hereof, in the city and county of San Francisco, on the 16th day of June, A. D. 1874, and upon Job Johnson Felt by personally delivering to him a true copy hereof in the county of Santa Clara, on the 18th day of June, A. D. 1874; and I further certify that I am unable to find the within-named Horace Kilham and William Augustus Dana in my district after diligent search.

E. P. MARSELLUS,
U. S. Marshal,
By B. J. AKERMAN,
Deputy.

WALTER VAN DYKE, *U. S. Attorney,*
Plaintiff's Attorney.

4 Filed on return 23d June, A. D. 1874.
L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

5 Circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
FRANK SOULÉ, CHRISTOPHER COLUMBUS Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan.

Complaint.

The United States of America, by Walter Van Dyke, its attorney, complains of Frank Soulé, Christopher Columbus Webb, Ira Packard

Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, the above-named defendants, and for cause of complaint allege as follows:

That heretofore the said defendant, Frank Soulé, was duly appointed and commissioned by the President of the United States, in pursuance of law, collector of internal-revenue taxes for the first collection district of the State of California, and thereupon, to wit, on the seventh
6 day of April, A. D. 1865, he duly entered upon the duties of his said office.

That said Frank Soulé was by law required to enter into and file a bond to the United States in the sum of one hundred thousand ($100,000) dollars, that being the sum prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, with not less than five sureties, conditioned that said collector, the said Frank Soulé, had truly and faithfully executed and discharged, and should continue to truly and faithfully execute and discharge all the duties of the said office according to law, and should justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which should come into his hands or possession; and that each and every deputy collector appointed by said Frank Soule had truly and faithfully executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of such deputy collector according to law.

That heretofore, on the 12th day of January, in the year of our Lord one thousand eight hundred and sixty-seven, at the city and county of San Francisco, in the State of California and district of Califor-
7 nia, the said defendants, by their certain writing-obligatory, the same being a bond as above referred to, signed by all of them, and sealed with their respective seals, a copy of which writing-obligatory, marked "Exhibit A," is hereto appended and made a part of this complaint, became jointly and severally bound, and acknowledged themselves to be held and firmly bound unto the said United States in the full sum of one hundred thousand ($100,000) dollars, money of the United States, for the payment of which, well and truly to be made, they thereby then and there jointly and severally bound themselves, their heirs, executors, and administrators, which said bond and the sureties thereof was duly approved by the Solicitor of the Treasury in pursuance of law.

Which said writing-obligatory was and is subject to certain conditions thereunto and therein written, whereby, after reciting in substance to the effect following, to wit: That whereas the President of the United States had, pursuant to law, appointed the said Frank Soulé collector of taxes, under an act entitled "An act to provide internal revenue to support the government, and to pay interest on the public debt," it is and was conditioned, in substance, as follows, to wit: That if the
8 said Frank Soulé, collector as aforesaid, had truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession; and if each and every deputy collector appointed by said collector has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the

duties of such deputy collectors according to law, that then the above obligation to be void and of no effect; otherwise that it shall abide and remain in full force and virtue, as by the copy of the said writing-obligatory hereto attached, marked "Exhibit A," and made part of this complaint, will more fully appear.

And the plaintiff alleges that the said Frank Soulé, by appointment of the President of the United States as aforesaid, was collector of taxes for the first internal-revenue district of the State of California, from and including the seventh day of April, in the year of our Lord one thousand eight hundred and sixty-five, until and inclusive of the
9 thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-nine.

That said office so held by the said Frank Soulé was and is the office referred to in and for which said bond was given, as hereinbefore recited.

That on divers days and times within the period aforesaid, to wit, from and including the seventh day of April, A. D. 1865, until to and inclusive of the thirtieth day of April, A. D. 1869, and while the said Frank Soulé was collector of taxes as aforesaid, he, the said Frank Soulé, received in his said official capacity as such collector of taxes, divers large sums of money of and belonging to the United States, the same being public money which came into his hands and possession as such collector of taxes, of which said large sums he has not justly and faithfully or otherwise accounted for or paid over, the sum of eighteen thousand three hundred and seventy-three and $\frac{36}{100}$ ($18,373.36) dollars, and has converted the same to his own use.

That his official accounts as such collector of taxes, under his aforesaid official bond or writing obligatory, have been heretofore, on the 25th day of September, A. D. 1873, adjusted at the Treasury Department of the United States, in conformity with law, and the rules
10 and regulations of the said department made in pursuance of law, whereby the said sum or balance of eighteen thousand three hundred and seventy-three and $\frac{36}{100}$ ($18,373.36) dollars has been ascertained and reported to be due to the United States from the said Frank Soule, collector of taxes as aforesaid. Which sum, or any part thereof, the said Frank Soule, although often requested so to do, hath hitherto wholly neglected and refused to properly or otherwise account for or pay over to the United States.

Wherefore the said Frank Soulé, collector of taxes as aforesaid, had not truly and faithfully or otherwise executed and discharged all his duties as such collector of taxes, and did not continue to truly and faithfully or otherwise, during the term of his said office and while he held the same and received the emoluments thereof, discharge all the duties of his said office according to law, and did not justly and faithfully or otherwise account for and pay over to the said United States, plaintiff herein, all moneys that came into his hands or possession as such collector of taxes; and wherefore each and every deputy collector appointed by said Frank Soulé, as such collector, had not truly and
11 faithfully or otherwise executed and discharged, and did not continue to faithfully and truly or otherwise, while they held their said appointments, execute and discharge all the duties of such deputy collectors according to law and the terms of said writing-obligatory.

And the said plaintiff assigns as a breach of the conditions aforesaid of the said writing-obligatory, that the said Frank Soulé, collector of taxes as aforesaid, had not truly and faithfully or otherwise executed and discharged all the duties of his said office according to law, and that

each and every deputy collector appointed by said Frank Soulé, as such collector, had not truly and faithfully or otherwise executed and discharged all the duties of such deputy collector according to law.

And the said plaintiff assigns as a further breach of the conditions aforesaid of the said writing-obligatory the neglect and refusal of the said Frank Soulé to justly and faithfully or otherwise execute and discharge his duties as such collector of taxes during the time he held his said office, and the neglect and refusal of each and every deputy collector appointed by said Frank Soulé, as aforesaid, to justly and faithfully or otherwise execute and discharge the duties of such dep-
12 uty collectors during the time they held their said appointments.

And the said plaintiff assigns as a further breach of the conditions aforesaid of the said writing-obligatory, the neglect and refusal of the said Frank Soulé to justly and faithfully or otherwise account for or pay over all public moneys that came into his hands or possession as such collector of taxes, and particularly his failure, refusal, and neglect to account for or pay over to said plaintiff the said sum of eighteen thousand three hundred and seventy-three $\frac{36}{100}$ ($18,373.36) dollars, as ascertained to be due from him to said plaintiff, the United States, as aforesaid.

And therefore the said plaintiff became and is entitled to, and so demands judgment against the said defendants upon the said bond or writing-obligatory for the said sum of eighteen thousand three hundred and seventy-three $\frac{36}{100}$ ($18,373.36) dollars.

Wherefore plaintiff brings suit, and prays judgment against said defendants for said sum of eighteen thousand three hundred and seventy-three $\frac{36}{100}$ ($18,373.36) dollars, with lawful interest thereon, and costs of suit.

WALTER VAN DYKE,
United States Attorney.

13 *Schedule A.*

Know all men by these presents, that we, Frank Soulé, as principal, and Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan as sureties, are held and firmly bound unto the United States of America in the full and just sum of one hundred thousand dollars, money of the United States, to which payment well and truly to be made we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this twelfth day of January, in the year one thousand eight hundred and sixty-seven.

The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said Frank Soulé collector of taxes under an act entitled "An act to provide internal revenue to support the government and to pay interest on the public debt": Now, therefore, if the said Frank Soulé has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of the said office
14 according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector has truly and faithfully executed

and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of such deputy collector according to law, then the above obligation to be void and of no effect, otherwise it shall abide and remain in full force and virtue.

FRANK SOULÉ. [SEAL.]
CHRISTOPHER COLUMBUS WEBB. [SEAL.]
IRA PACKARD RANKIN. [SEAL.]
JOB JOHNSON FELT. [SEAL.]
FREDERICK HUBBELL WATERMAN. [SEAL.]
JAMES DOWS. [SEAL.]
SAMUEL SOULÉ. [SEAL.]
WILLIAM AUGUSTUS DANA. [SEAL.]
JAMES McM. SHAFTER. [SEAL.]
JOHN CENTER. [SEAL.]
HORACE KILHAM. [SEAL.]
SAMUEL BRANNAN. [SEAL.]

Sealed and delivered in the presence of—
F. J. THIBAULT.
JAMES ROLPH.

[Int. rev. stamp, one dollar.]

15 I, Frank Soulé, having been appointed to the office of collector of taxes under an act entitled "An act to provide internal revenue to support the government and to pay interest on the public debt," do solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto.

And I do further swear that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

FRANK SOULÉ.

16 Sworn and subscribed this sixteenth day of January, 1867, before me. Witness my hand and seal.

[SEAL.] F. J. THIBAULT,
Notary Public.

[Int. rev. stamp, 5 cents.]

I, W'm Loewy, county clerk of the city and county of San Francisco, do hereby certify that F. J. Thibault, who administered the above, is now, and was at the time of doing so, duly authorized to administer the same, and that full faith and credit are due to his official attestation.

In testimony whereof I have hereto set my hand and affixed the seal of the 12th district court of said county this 17th day of January, 1867.

[SEAL.] W'M LOEWY,
County Clerk and ex-officio Clerk of the 12th District Court of said City and County.

[Int. rev. stamp, 5 cents.]

OFFICE OF U. S. ATTORNEY, DISTRICT OF CALIFORNIA,
January, 1867.

I certify that the sureties to the foregoing bond are amply
17 sufficient for the penalty thereof.

DELOS LAKE,
U. S. Att'y.

[Int, rev. stamp, 5 cents.]

TREASURY DEPARTMENT, SOLICITOR'S OFFICE,
February 12th, 1867.

I have examined the within bond and find it to be executed in proper form, and I approve the sureties thereto as sufficient.

EDWARD JORDAN,
Solicitor of the Treasury.

(Endorsed:) Filed June 5th, A. D. 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

18 *Alias summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States, of the ninth circuit, in and for the district of California.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* FRANK SOULÉ ET AL., DEFENDANTS.	Action brought in the said circuit court and complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America, greeting: To Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, defendants:

You are hereby, as you have been heretofore, required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the dis-
19 trict of California, and to file your plea, answer, or demurrer to the complaint filed therein, in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county, or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover from you the sum of eighteen thousand three hundred and seventy-three $\frac{36}{100}$ ($18,373.36) dollars for the breach of a certain bond signed, sealed, and delivered by you and each of you to said United States, dated January 12, 1867, conditioned for the true, &c., execution and discharge by said Frank Soulé of the duties of the office of collector of internal-revenue taxes for the first collection district of the State of California, together with lawful interest on said sum of $18,373.36 and costs of suit, and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Morrison R. Waite, Chief Justice of the Su-

preme Court of the United States of America, this 29th day of
20 July, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth.

[SEAL.] LORENZO S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:)

OFFICE OF U. S. MARSHAL,
District of California, ss:

I hereby certify that I received the within summons on the 10th day of August, 1874, and personally served the same upon Horace Kilham, one of the def'd'ts named herein, by personally delivering to and leaving with him a copy hereof, on this the 21st day of September, A. D. 1874, at the city and county of San Francisco.

E. P. MARSELLUS,
U. S. Marshal,
By C. H. MEAD, *Dep'y.*

WALTER VAN DYKE,
U. S. Attorney, Plaintiff's Attorney.

Filed 21st Sept., 1874.

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

21 *Amended complaint.*

Circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
FRANK SOULÉ, CHRISTOPHER COLUMBUS WEBB, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan.

The United States of America, by Walter Van Dyke, its attorney, complains of Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, the above-named defendants, and for cause of complaint allege' as follows:

That heretofore the said defendant, Frank Soulé, was duly appointed and commissioned by the President of the United States, in pursuance of law, collector of internal-revenue taxes for the first collection district of the State of California, and thereupon, to wit, on the seventh day of April, A. D. one thousand eight hundred and sixty-five,
22 he, after having duly qualified, entered upon the duties of his said office.

That said Frank Soulé was by law required to enter into and file a bond to the United States in the sum of one hundred thousand ($100,000) dollars, that being the sum prescribed by the Commissioner of In-

ternal Revenue, under the direction of the Secretary of the Treasury, with not less than five sureties, conditioned that said collector, the said Frank Soulé, had truly and faithfully executed and discharged, and should continue to truly and faithfully execute and discharge, all the duties of the said office according to law, and should justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which should come into his hands or possession, and that each and every deputy collector appointed by said Frank Soulé had truly and faithfully executed and discharged, and should continue truly and faithfully to execute and discharge, all the duties of such deputy collector, according to law.

That heretofore, on the twelfth day of January, in the year of our Lord one thousand eight hundred and sixty-seven, at the city and
23 county of San Francisco, in the State of California and district of California, the said defendants, by their certain writing-obligatory, the same being a bond, as above referred to, signed by all of them and sealed with their respective seals, a copy of which writing-obligatory, marked "Exhibit A," is hereto appended and made a part of this complaint, became jointly and severally bound and acknowledged themselves to be held and firmly bound unto the said United States in the full sum of one hundred thousand ($100,000) dollars money of the United States, for the payment of which, well and truly to be made, they thereby then and there jointly and severally bound themselves, their heirs, executors, and administrators, which said bond and the sureties thereof was duly approved by the Solicitor of the Treasury, in pursuance of law; which said writing-obligatory was and is subject to certain conditions thereunto and therein written, whereby, after reciting in substance to the effect following, to wit:

That whereas the President of the United States had, pursuant to law, appointed the said Frank Soulé collector of taxes, under an act entitled "An act to provide internal revenue to support the gov-
24 ernment and to pay interest on the public debt," it is and was conditioned in substance as follows, to wit: That if the said Frank Soulé, collector as aforesaid, had truly and faithfully executed and discharged and shall continue truly and faithfully to execute and discharge all the duties of the said office, according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector has truly and faithfully executed and discharged and shall continue truly and faithfully to execute and discharge all the duties of such deputy collector, according to law, that then the above obligation to be void and of no effect; otherwise, that it shall abide and remain in full force and virtue, as by the copy of the said writing-obligatory hereto attached, marked "Exhibit A," and made part of this complaint, will more fully appear.

And the plaintiff alleges that the said Frank Soulé, by appointment of the President of the United States as aforesaid, was collector of taxes for the first internal-revenue district of the State of Cali-
25 fornia from and including the said seventh day of April, in the year of our Lord one thousand eight hundred and sixty-five, until and inclusive of the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-nine.

That said office held by the said Frank Soulé was and is the office referred to in and for which said bond was given as hereinbefore recited.

That on divers days and times within the period aforesaid, to wit, from and including the seventh day of April, A. D. one thousand eight hundred and sixty-five, until to and inclusive of the thirtieth day of April, A. D. one thousand eight hundred and sixty-nine, and while the said Frank Soulé was collector of taxes as aforesaid, he, the said Frank Soulé, received in his said official capacity as such collector of internal-revenue taxes, divers large sums of money of and belonging to the United States, the same being public money which came into his hands and possession as such collector of internal-revenue taxes, of which said large sums of money he has not justly and faithfully or otherwise accounted for or paid over the sum of eighteen thousand three hundred and seventy-three and $\frac{36}{100}$ ($18,373.36) dollars, and has converted the same to his own use.

26 That the official accounts of the said Frank Soulé as such collector of taxes under his aforesaid bond or writing-obligatory have been heretofore, on the 25th day of September, A. D. 1873, adjusted at the Treasury Department of the United States, in conformity with law, and the rules and regulations of the said department made in pursuance of law, whereby the said sum or balance of eighteen thousand three hundred and seventy-three and $\frac{36}{100}$ ($18,373.36) dollars has been ascertained and reported to be due to the United States from the said Frank Soulé, collector of taxes as aforesaid; which sum, or any part thereof, the said Frank Soulé, although often requested so to do, hath hitherto wholly neglected and refused to properly or otherwise account for or pay over to the United States.

And the said plaintiff assigns as a breach of the conditions aforesaid of the said writing-obligatory the neglect and refusal of the said Frank Soulé to justly and faithfully, or otherwise, account for or pay over all public moneys that came into his hands or possession as such collector of taxes, and particularly his failure, refusal, and neglect to account for and pay over to said plaintiff the said sum of eighteen thousand

27 three hundred and seventy-three and $\frac{36}{100}$ ($18,373.36) dollars, as ascertained to be due from him to said plaintiff, the United States, as aforesaid.

And therefore the said plaintiff became and is entitled to, and so demands judgment against the said defendants, Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, upon the said writing-obligatory, for the said sum of eighteen thousand three hundred and seventy-three $\frac{36}{100}$ and ($18,373.36) dollars.

Wherefore plaintiff brings suit, and prays judgment against said defendants for said sum of eighteen thousand three hundred and seventy-three and $\frac{36}{100}$ ($18,373.36) dollars, with lawful interest and costs of suit.

WALTER VAN DYKE,
U. S. Att'y.

EXHIBIT A.

Know all men by these presents that we, Frank Soulé, as principal, and Christopher Columbus Webb, Ira Packard Rankin, Job

28 Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one hundred thousand dollars, money of the United States, to

which payment, well and truly to be made we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this twelfth day of January, in the year one thousand eight hundred and sixty-seven.

The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said Frank Soulé collector of taxes under an act entitled "An act to provide internal revenue to support the government and to pay interest on the public debt".

Now, therefore, if the said Frank Soulé has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of
29 the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue.

FRANK SOULÉ.	[SEAL.]
CHRISTOPHER COLUMBUS WEBB.	[SEAL.]
IRA PACKARD RANKIN.	[SEAL.]
JOB JOHNSON FELT.	[SEAL.]
FREDERICK HUBBELL WATERMAN.	[SEAL.]
JAMES DOWS.	[SEAL.]
SAMUEL SOULÉ.	[SEAL.]
WILLIAM AUGUSTUS DANA.	[SEAL.]
JAMES McM. SHAFTER.	[SEAL.]
JOHN CENTER.	[SEAL.]
HORACE KILHAM.	[SEAL.]
SAMUEL BRANNAN.	[SEAL.]

Sealed and delivered in the presence of—
F. J. THIBAULT.
JAMES ROLF.

I, Frank Soulé, having been appointed to the office of collector of taxes under an act entitled "An act to provide internal revenue to support the government and to pay interest on the public debt," do
30 solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto.

And I do further swear that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will well and faithfully

discharge the duties of the office on which I am about to enter. So help me God.

FRANK SOULÉ.

Sworn and subscribed, this sixteenth day of January, 1867, before me. Witness my hand and seal.

[SEAL.] F. J. THIBAULT,
Notary Public.

[Int. rev. stamp, 5 cents.]

31 I, William Loewy, county clerk of the city and county of San Francisco, do hereby certify that F. J. Thibault, who administered the above, is now and was at the time of doing so duly authorized to administer the same, and that full faith and credit are due his official attestations.

In testimony whereof I have hereto set my hand and affixed the seal of the 12th district court of said county this 17th day of January, 1867.

[SEAL.] W'M LEOWY,
County Clerk and ex-officio Clerk of the 12th Dist. Court of said City and County.

[Int. rev. stamp, 5 cents.]

OFFICE OF THE U. S. ATTORNEY,
DISTRICT OF CALIFORNIA, *Jan'y*, 1867.

I certify that the sureties to the foregoing bond are amply sufficient for the penalty thereof.

DELOS LAKE,
U. S. Att'y.

[Int. rev. stamp, 5 cents.]

32 TREASURY DEPARTMENT,
SOLICITOR'S OFFICE, *February* 12, 1867.

I have examined the within bond and find it to be executed in proper form, and I appreve the sureties thereto as sufficient.

EDWARD JORDAN,
Solicitor of the Treasury.

(Endorsed:) Filed 15 October, 1874. L. S. B. Sawyer, clerk.

33 *Answer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES }
vs.
FRANK SOULÉ ET AL. }

Now come the defendants, Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, and answering the complaint of the plaintiff herein, deny each and every allegation, matter, and thing in said complaint contained.

Further answering, the defendants aver that the said Frank Soulé was on the twenty-fifth day of July, A. D. 1866, duly appointed by the Presi-

dent of the United States, by and with the advice and consent of the Senate of the United States, collector of internal revenue for the first collection district of California, and that thereafter, to wit, on the second day of November, A. D. 1866, in pursuance of the requirement of law in that behalf, he made and executed, with not less than five good and
34 sufficient sureties, a bond conditioned that he as such collector should faithfully perform he duties of his office according to law, and otherwise conditioned as required by law; which said bond, made and executed as aforesaid, was transmitted to and received and accepted by the Secretary of the Treasury of the United States, and from thence has been retained by said Secretary, and remained on file in the office of the First Comptroller of the Treasury and in full force and effect.

That thereupon the said Frank Soulé entered upon the duties of the said office of collector under said bond.

That thereafter, to wit, on or about the 18th day of December, 1866, the Commissioner of Internal Revenue of the United States, under color of his office, but without authority of law, demanded and exacted of the said Frank Soulé, as a condition of his retaining the said office of collector, another official bond, which said bond, for the purpose of retaining his said office, and not otherwise, the said Frank Soulé, together with these defendants, made and executed and transmitted to the Secretary of the Treasury; which said bond last named is the bond described and referred to in the complaint, and a copy of which is annexed
35 thereto, and marked "Exhibit A."

And the defendants aver that the bond last named was not required by law, nor had the said Commissioner authority of law or otherwise to exact the same from the said Frank Soulé or these defendants: that the same was not voluntarily given, and is therefore void and of no effect as against these defendants.

Further answering, the defendants aver that at the time of the expiration of the term of office of the defendant, Frank Soulé, as collector of internal revenue, there were remaining in his hands certain lists of uncollected taxes, amounting to the sum of three hundred and forty-five thousand three hundred and thirty-four and $\frac{16}{100}$ ($345,334.16) dollars, which said lists of uncollected taxes, amounting to said sum were on the 30th day of April, A. D. 1869, transferred and delivered to his successor in office, and for such amount he was entitled to credit in his accounts as such collector.

That a claim for such credit had before the commencement of this suit been presented by the said Soulé to the Commissioner of Internal
36 Revenue and the proper accounting-officers of the Treasury for examination and allowance by them, and that the said Commissioner of Internal Revenue and said proper accounting-officers of the Treasury have disallowed the sum of eight thousand six hundred and thirty-six and $\frac{45}{100}$ ($8,636.45) dollars, and the said defendants aver that said sum of eight thousand six hundred and thirty-six and $\frac{45}{100}$ ($8,636.45) dollars is justly due from the United States to the said Frank Soulé, and that he is justly entitled to credit therefor.

Further answering, defendants aver that during all the time the said Frank Soulé held the office of collector of internal revenue, under the aforesaid appointment, he paid into the Treasury of the United States daily, under the instructions of the Secretary of the Treasury, the gross amount of all duties, taxes, and revenues received or collected by him, by virtue of the several acts to provide internal revenue to support the government and to pay interest on the public debt, and all other acts in force during the said term connected with the internal revenues, without

any abatement or deduction on account of salary, compensation, fees, costs, charges, or claims of any description whatever, and that
37 certificates of such payment stating the name of the depositor and the specific accounts on which the deposits were made, signed by the assistant treasurer at San Francisco, were duly transmitted to and amount of duties, taxes, and revenues received and collected, paid into received by the Commissioner of Internal Revenue; that of the said gross the Treasury as aforesaid, the Commissioner of Internal Revenue and the proper accounting-officers of the Treasury have disallowed the sum of ten thousand and twenty & $\frac{73}{100}$ ($10,020.73) dollars; that a claim for such credit had before the commencement of this suit been presented by the said Frank Soulé to the Commissioner of Internal Revenue and the proper accounting-officers of the Treasury for examination and allowance by them, and that the said Commissioner of Internal Revenue and said proper accounting-officers have disallowed the same, and the said defendants aver that the said sum of ten thousand and twenty and $\frac{73}{100}$ ($10,020.73) dollars is justly due from the United States to the said Frank Soulé, and that he is justly entitled to credit therefor.

Further answering, defendants aver that during the month of April, A. D. 1867, the said defendant, Frank Soulé, paid into the Treasury
38 of the United States daily, under the instructions of the Secretary of the Treasury, the gross amount of all duties, taxes, and revenues received or collected by him during said month, by virtue of the several acts to provide internal revenue to support the government and to pay interest on the public debt, and all other acts then in force connected with the internal revenue, to wit, amounting to the sum of $428,198.30, and that certificates of such payments, stating the name of the depositor and the specific account on which the deposits were made, signed by the assistant treasurer at San Francisco, were duly transmitted to and received by the Commissioner of Internal Revenue, which said amount he, the said Frank Soulé, was entitled to credit in his accounts as such collector; that claim for such credit had before the commencement of this suit been presented by the said Frank Soulé to the Commissioner of Internal Revenue, and the proper accounting-officer of the Treasury for examination and allowance by them, and that the said Commissioner of Internal Revenue and said proper accounting officers have disallowed the sum of four hundred and forty-nine and $\frac{33}{100}$
39 ($449.33) dollars, and the said defendants aver that the said sum of four hundred and forty-nine and $\frac{33}{100}$ ($449.33) dollars is justly due from the United States to the said Frank Soulé, and that he is justly entitled to credit therefor.

Wherefore defendants pray to be hence dismissed with costs.

LATIMER & MORROW,
Attorneys for Defendants.

(Endorsed:)

Service of copy of within answer admitted this 21st day of November, A. D. 1874.

WALTER VAN DYKE,
U. S. Attorney.

Filed 21 November, 1874.

L. S. B. SAWYER, *Clerk.*

40 *Verdict of the jury.*

IN THE CASE OF THE UNITED STATES
vs.
F. SOULÉ AND HIS SURETIES.

We, the jury, find for the plaintiff in the sum of $11,744.23.

E. G. MATHEWS,
Foreman.

(Endorsed:) Filed April 8th, 1875. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

41 *Judgment.*

In the circuit court of the Unitep States of the ninth judicial circuit in and for the district of California.

THE UNITED STATES OF AMERICA
vs.
FRANK SOULÉ ET AL.
No. 1242.

This cause having come on regularly for trial on the 31st day of March, A. D. 1875, being a day in the February term, A. D. 1875, of said court, before the court and a jury of twelve men duly impanelled, A. P. Van Duzer and J. M. Coghlan, esq's, assistant U. S. attorneys, appearing on behalf of the United States, and Latimer and Morrow, esq's, on behalf of defendants, and the trial having been proceeded with upon the 1st, 2d, 3d, 6th, 7th, and 8th days of April of said year, and documentary evidence having been introduced, and witnesses having been sworn and examined on behalf of the respective parties hereto, and the evidence being closed, the cause after arguments of counsel and the instructions of the court having been submitted to the jury for consideration and decision, and the jury after due deliberation having rendered the following verdict:

42 "We, the jury, find for the plaintiff in the sum of $11,744.23," and the court having thereupon ordered that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises, it is considered by the court that the United States of America, plaintiff, do have and recover of and from Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan, defendants, the sum of eleven thousand seven hundred and forty-four $\frac{23}{100}$ dollars, and the costs in this behalf expended, taxed at (clerk's costs) one hundred and six $\frac{39}{100}$ dollars.

Judgment entered the 8th day of April, 1875.

L. S. B. SAWYER, *Clerk.*

A true copy of an original entered in the therein-entitled cause in judgment register C. L., No. 2, page 87.

Attest, &c.:

L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 8 April, 1875. L. S. B. Sawyer, clerk.

43 *Certificate to judg't-roll.*

UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing and hereunto annexed papers constitute the judgment-roll in the action therein entitled.

Witness my hand and the seal of said circuit court this 8th day of April, 1875.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

44 (Endorsed:) Judgment-roll. Filed 8th April, 1875. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

45 *Bill of exceptions.*

Circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
FRANK SOULÉ, CHRISTOPHER COLUMBUS WEBB, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan.

Be it remembered, that this cause came on regularly for trial at the February term of said circuit court, A. D. 1875, and to show that the defendants were indebted to the plaintiff, the plaintiff offered in evidence a transcript from the books and proceedings of the Treasury Department showing the state of the accounts of the defendant Soulé as late collector of internal revenue for the late first collection district of California.

By this transcript it appears that there was a balance due from
46 Soulé, as such collector, to the United States, of $18,373.36.

The account stated in the transcript was certified as follows, to wit:

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
March 6th, 1873.

I hereby certify that I have examined and adjusted an account between the United States and Frank Soulé, late collector for the first district of California, from to April 30th, 1869, and find him chargeable as follows: (Here followed a statement of the items of debits and credits and the balance, and then the certificate continued,) as appears from accounts and vouchers herewith transmitted for the decision of the Comptroller thereon.

J. B. MANN,
Acting Auditor.

To the FIRST COMPTROLLER OF THE TREASURY.

It was admitted that J. B. Mann was the acting Fifth Auditor.

The defendants objected to the introduction of the transcript in evidence, upon the ground that it appeared upon the face of the transcript that the account stated therein was audited, adjusted, and balance
47 certified by the Fifth Auditor; that such Auditor had no power or authority to adjust, audit, or certify said account and that therefore the transcript and the account stated therein were inadmissable and incomp etent to charge the defendant.

The court overruled the objection, and the transcript and account was admitted and read in evidence; to which ruling the defendants then and there duly excepted.

The plaintiff introduced no evidence of the state of the account between the United States and the defendant Soulé, or of the balance due from Soulé, except the said transcript.

In the said transcript this item appeared charged against the defendant Soulé, to wit:

"Amount of gaugers' fees collected in excess. Form 108, $494.38."

It was proven that the sum stated in this item was received by the defendant Soulé subsequent to the date of the passage of the act of Congress entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 20, 1868, and under and in pursuance of the 53d section of that act.

The court instructed the jury that the sureties upon the official
48 bond of the defendant Soulé, that is to say, the sureties upon the bond on which this suit was brought, were liable for that item; to which instruction the defendants, who were such sureties, then and there duly excepted.

In the said transcript this item appeared charged against the defendant Soulé, to wit:

"Amount of error by the assessor in footing lists (Form 23), as per report of supervisor, $6,544.96."

The court instructed the jury that the transcript was prima-facie evidence of the correctness of that item, and sufficient to charge the defendants therewith; to which instruction the defendant Soulé, on his own behalf, and the defendants, who were sureties, on their behalf, severally then and there duly excepted. No evidence relating to that item was given, except such as was afforded by the transcript.

It was proven upon the trial that the defendant Soulé was appointed by the President, collector of internal revenue for the first collection district of California, on the 28th day of March, 1865, to hold until the expiration of the next session of Congress thereafter, and no longer, and that he took the oath and gave the bond required of him, and
49 entered upon and continued in the discharge of the duties of that office.

That on the 25th day of July, 1865, and while the defendant Soulé was continuing to discharge the duties of the office under the appointment aforesaid, the President, by and with the advice and consent of the Senate, appointed him collector of internal revenue for the same district. That he was advised of such appointment, and required to give a bond thereunder, by a letter, of which the following is a copy, to wit:

TREASURY DEPARTMENT,
OFFICE INTERNAL REVENUE,
Washington, July 30th, 1866.

SIR: I have to inform you that the President, by and with the advice and consent of the Senate, has appointed you collector of internal reve-

nue for the first collection district of California; and your commission will be forwarded to you upon the recept and approval of your official bond, a blank form of which is enclosed.

The penalty is fixed at $100,000.

Very respectfully,

THOMAS HARLAND,
Deputy Commissioner.

50 FRANK SOULÉ, Esq.,
Coll'r 1st Dist., San Francisco, Cal.
J. L. W. H.

That in pursuance thereof he made and executed the bond required with sufficient sureties, the bond so executed being several, and not joint and several, and transmitted the same to the Commissioner of Internal Revenue, and received in response the following letter, to wit:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, December 18, 1866.

SIR: Your new official bond as collector of the 1st dist. of California has been received and referred to the Solicitor of the Treasury, and on the 15th inst. it was returned to this office with the following endorsement:

"The within bond is several, and not joint and several. All the parties should be bound jointly and severally."

I enclose herewith a blank bond, and you will please execute a new one, correcting the error referred to.

Very respectfully,

THOMAS HARLAND,
51 *Deputy Commissioner.*

FRANK SOULÉ, Esq.,
Collector 1st Dist., San Francisco, Cal.
J. L. W. H.

This bond bore date Nov. 2nd, 1866, and ever since its receipt has been and is retained by the plaintiff, and the defendant has been charged thereupon by an account stated thereunder, a transcript of which, certified by the Auditor, Comptroller, and Secretary of the Treasury, and containing a full statement of the accounts of the defendant Soulé as collector of internal revenue for the district named, from the 2nd day of Nov., 1866, to the 12th day of January, 1867, the date of the bond upon which this suit was brought, was put in evidence on the trial of this case by the plaintiff.

The defendant Soulé was called as a witness on the part of the defendants, and testified that in accordance with the instructions and requirements contained in that letter he executed upon the blank enclosed with the letter, and transmitted to the Commissioner of Internal Revenue, the bond described in the declaration, and upon which this suit was brought. That up to the time of such execution and transmission
52 he had not received his commission under the appointment last named; and that he executed the bond and transmitted it to the Commissioner in order that he might get such commission, and that he supposed it was necessary to do so to get the commission.

That he would not have executed the bond had he not been directed to do so by the Commissioner.

That he did not remember making any objection to executing it; that he supposed it had to be done because the Commissioner had directed it, and that he did not suppose any communication he could write would make any change.

That he did not know that the Commissioner had no authority to require that bond unless so directed by the Secretary of the Treasury.

This was all the testimony relating to the execution of that bond, and the court instructed the jury that upon those facts the bond was not extorted, but was a voluntary bond, and as such the defendant Soulé and his sureties were liable upon it; to which instruction the defendant then and there duly excepted.

The court also instructed the jury that the direction to execute
53 another bond, contained in the letter of the Commissioner dated Dec. 18th, 1866, being one of the letters hereinbefore copied, must be considered as the direction of the Secretary of the Treasury; to which instruction the defendants then and there duly excepted.

There was no testimony tending to show that the Secretary of the Treasury ever directed or requested the defendant Soulé to give any bond, except such as may be afforded by the letter last named.

The jury found a verdict for the plaintiff for the sum of $11,744.23, and in this sum they included the items hereinbefore stated, of $494.38, gauger's fees collected in excess, and the item of $6,544.96, error by the assessor in footing lists, as per report of supervisor, the said error having arisen in transactions occurring since the execution of the bond sued on.

And forasmuch as the matters aforesaid do not appear in the record of the proceedings upon the trial, the counsel for the defendants have prepared this bill of exceptions, containing the substance of all the facts, matters proved, and evidence given pertinent or in any way relating to the exceptions taken, and have requested his honor the judge of
54 this court to set his hand and seal thereto, which the said judge has done during the term of court aforesaid, this 22d day of June, 1875.

(Signed) [SEAL.] LORENZO SAWYER,
Circuit Judge.

(Endorsed:)

Ten days from May 7th, 1875, is hereby given to plaintiff to file amendments to the within bill of exceptions.

San Francisco, May 7th, 1875.

LATIMER & MORROW,
Att'ys for Def'ts Soulé et als.

Filed 25 June, 1875.

L. S. B. SAWYER, *Clerk.*

55 *Bond.*

In the Supreme Court of the United States.

FRANK SOULÉ ET AL., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

Know all men by these presents that we, Addison M. Crane and Henry H. Ellis, both residents of the city and county of San Francisco,

State of California, are held and firmly bound unto the United States of America in the sum of fourteen thousand ($14,000) dollars lawful money of the said United States, to be paid to the United States of America; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this twenty-seventh day of April, A. D. 1875.

Whereas Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter,
56 John Center, Horace Kilham, and Samuel Brannan have prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the action in the circuit court of the United States for the district of California, entitled "The United States of America vs. Frank Soulé et al.:" Now, therefore, the condition of this obligation is such that if the above-named Frank Soule, Christopher Columbus Webb, Ira Packard Rankin, Job Johnson Felt, Frederick Hubbell Waterman, James Dows, Samuel Soulé, William Augustus Dana, James McM. Shafter, John Center, Horace Kilham, and Samuel Brannan shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ADDISON M. CRANE. [SEAL.]
HENRY HIRAM ELLIS. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA,
District of California, ss:

Addison M. Crane and Henry H. Ellis, being duly sworn, each
57 for himself, deposes and says that he is a householder in said district, and is worth the sum of fourteen thousand dollars exclusive of property exempt from execution, and over and above all debts and liabilities.

ADDISON M. CRANE.
HENRY HIRAM ELLIS.

Subscribed and sworn to before me this 27th day of April, A. D. 1875.
JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Dist. of Cal'a.

(Endorsed:)

I approve the form of the within bond and the sufficiency of the sureties thereon.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

Filed April 27th, 1875.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

58 UNITED STATES OF AMERICA,
District of California:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit within and for the district of Cali-

fornia, do hereby certify that the foregoing fifty-seven written pages, numbered from 1 to 57 both inclusive, contain a true copy of the record and of all proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this fifth day of October, A. D. 1875.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsement on cover:) No. 295. Frank Soulé, Christopher Columbus Webb, Ira Packard Rankin, Joe Johnson Felt et al., plaintiffs in error, vs. The United States. California C. C. U. S. Filed 29th October, 1875.



No. 295.

SUPREME COURT

OF THE

UNITED STATES

FRANK SOULÉ, ET AL.,

Plaintiff in Error.

VS.

THE UNITED STATES,

Brief for Plaintiffs

IN ERROR.

W. W. MORROW,

Counsel for Plaintiffs in Error.

Supreme Court of the United States.

FRANK SOULÉ, ET AL.,
Plaintiffs in Error,

vs.

THE UNITED STATES.

Brief for Plaintiff's in Error.

Statement of the Case.

This is an action on the official bond of Frank Soule, as Collector of Internal Revenue for the first collection district of California, to recover a balance due the United States, as shown by certain transcripts of account. The bond is dated January 12th, 1867, and is signed by the said Frank Soule as principal, and the other plaintiffs in error as sureties.

ASSIGNMENT OF ERRORS.

I.

The Court erred in admitting in evidence the transcript of accounts as audited by the Fifth Auditor (Transcript of Record, page 17).

II.

The Court erred in instructing the jury that the sureties upon the official bond of the defendant Soule, that is to say, the sureties upon the bond on which this suit was brought, were liable for the item charged in the transcript against the defendant Soule, to-wit:

"Amount of gauger's fees collected in excess, (form 108) $494 38." (Transcript of Record, page 18.)

III.

The Court erred in instructing the jury that the transcript was *prima facie* evidence of the correctness of the item charged in the transcript against the defendant Soulé, to-wit:

"Amount of error by the Assessor in footing lists (form 23), as per report of Supervisor, $6,544-96." (Transcript of Record, page 18.)

IV.

The Court erred in instructing the jury that the bond upon which this suit was brought, to-wit: the bond dated January 12th, 1867, was not extorted, but was a voluntary bond, and, as such, the defendant Soule and his sureties were liable upon it. (Transcript of Record, pages 18-20.)

V.

The Court erred in instructing the jury that the direction to execute another bond contained in the

letter of the Commissioner, dated Dec. 18th, 1866, must be considered as the direction of the Secretary of the Treasury. (Transcript of Record, pages 18-20.)

POINT I.

The Fifth Auditor was not authroized by law to audit the accounts of Collectors of Internal Revenue.

The office of Fifth Auditor was created by the Act of March 3d, 1817, (3 Statutes at Large, page 366,) Section 4 of which provided, "And it shall be the duty of the Fifth Auditor to receive all accounts accruing in, or relative to, the department of State, the general Post Office, and those arising out of Indian affairs, and examine the same, and thereafter certify the balance and transmit the accounts, with the vouchers and certificate, to the First Comptroller for his decision thereon."

Section 2 of the Act of June 30, 1864, (13 Statutes at Large, page 223,) provides, "That it shall be the duty of the Commissioner of Internal Revenue to pay over daily to the Treasurer of the United States all public moneys which may come into his possession, for which the Treasurer shall give proper receipts and keep a faithful account: and at the end of each month the said Commissioner shall render true and faithful accounts of all public moneys received or paid out or paid to the Treasurer of the United States, exhibiting proper vouchers therefor, and the same shall be

received and examined by the Fifth Auditor of the Treasury, who shall thereafter certify the balance, if any, and transmit the accounts with the vouchers and certificate to the First Comptroller for his decision thereon."

It is claimed that the authority of the Fifth Auditor to audit the accounts of Collectors of Internal Revenue is derived from the section of law just quoted, but it will be observed that the section only relates only to the Commissioner of Internal Revenue, and goes on to provide that "He shall at all times submit to the Secretary of the Treasury and the Comptroller, or either of them, the inspection of moneys in his hands, and shall, prior to the entering upon the duties of his office, execute a bond with sufficient sureties to be approved by the Secretary of the Treasury and by the First Comptroller in a sum of not less than one hundred thousand dollars, payable to the United States, conditioned that said Commissioner shall faithfully perform the duties of his office according to law, and shall justly and faithfully account for and pay over to the United States in obedience to law, and in compliance with the order or regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and for the safe keeping, and faithful account of all stamps, adhesive stamps, or vellum parchment or paper bearing a stamp denoting any duty thereon, which bond shall be filed in the office of the First Comptroller of the Treasury, and such Commissioner shall, from time to time, renew, strengthen and increase his

official bond, as the Secretary of the Treasury may direct."

The Commissioner, under the law, has a responsibility of his own, separate and distinct from Collectors and other subordinates, and it was the matters of accounts connected with this separate responsiblity, that were to be received and examined by the Fifth Auditor.

Furthermore, under section 3 of the Act of March 3d, 1865, (13 Statutes at Large, page 483), all duties, taxes, etc., received or collected, had to be paid by the Collectors or other officers receiving or collecting the same daily into the Treasury of the United States, under the instructions of the Secretary of the Treasury.

It is manifest therefore, that the accounts of the Commissioner do not and cannot under the law properly include the accounts of Collectors of Internal Revenue. But, suppose they do; the certificate of the Auditor is not to the effect that he has examined and adjusted an account between the United States and the incumbent of the office of Commissioner of Internal Revenue, and for aught that appears that account has never been adjusted.

POINT II.

The sureties are not liable for the amount of gauger's fees collected, because this was a duty imposed by section 53, of the Act of July 20, 1868, (15 Statutes at Large, page 147,) an Act passed a year and a half subsequent to the giving of the bond.

Soule was appointed Collector under Section 2 of the Act of July 1st, 1862, (12 Statutes at Large, page 433), which provided "That for the purpose of assessing, levying and collecting the duties or taxes *hereinafter prescribed by this Act*, the President of the United States be and he is hereby authorized * * * * to appoint * * * a Collector for each District." This section was continued in force by Section 7, Act of June 30, 1864, (13 Statutes at Large, page 224.)

The duty of collecting gauger's fees was not imposed on the Collector by any Act prior to July 20th, 1868; nor was it a duty so connected with, or naturally belonging to, the office of Collector, as to be within the reasonable contemplation of the parties to the bond at the time of its execution.

An official bond, given by a Collector of Internal Taxes, with sureties conditioned for the discharge of his duties according to law, does not cover duties created by laws subsequently enacted.

United States vs. *Kirkpatrick*, 9 Wheaton, 720.

United States vs. *Singer*, 15 Wallace, 111.

POINT III.

The charge of $6,544.96, amount of error by the Assessor in footing list, as per report of Supervisor, is not proven by the transcript.

The Assessor was a local officer (Section 2, Act of July 1st, 1862, 12 Statutes at Large, page 432, and Sections 7 and 8, Act of June 30th, 1864, 13

Statutes at Large, page 224), whose lists were chargeable to the Collector only on the receipts executed by the Collector, as required by Section 27, Act of June 30, 1864 (13 Statutes at Large, page 232.)

The Supervisor was also a local officer (Sec. 49, Act of July 20, 1868, 15 Statutes at Large, page 144) and his reports were not made evidence by any law of the United States.

"An account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the Act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated.

But where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be be established, not by the treasury statement, but by the evidence on which that statement was made."

United States vs. *Buford*, 3 Peters, 12.

See also *United States* vs. *Jones*, 8 Peters, 381 and 396-7.

Cox vs. *United States*, 6 Peters, 202.

In the case at bar, the lists should have been produced. They were the best evidence of an error if such existed, and they were in the possession of the plaintiff. As it was, there was no identification of the particular list, and no means afforded for an examination of the alleged error.

POINT IV.

Soule was appointed Collector by the President on the 28th day of March, 1865, to hold until the expiration of the next session of Congress thereafter. On the 25th day of July, 1866, he was appointed his own successor by the President, by and with the advice and consent of the Senate. He was notified of his re-appointment by the Deputy Commissioner of Internal Revenue, under date of July 30, 1866, and that his Commission would be forwarded to him upon the receipt and approval of his official bond, a blank form of which was enclosed in the letter, (Transcript, pages 18, 19.) The bond was executed upon the very form enclosed, and in accordance with the instructions, and returned to the Commissioner. Soule thereupon became entitled to his Commission, but instead of sending it to him, the Commissioner wrote to him, under date of December 18, 1866, that his bond had been referred to the Solicitor of the Treasury, who had returned it with the endorsement: "the bond is several, and not joint and several. All the parties should be bound jointly and severally;" and thereupon he required a new bond.

Sec. 9, Act of June 30, 1864, (13 Statutes at Large, page 225,) is the law requiring Collectors to give bonds, and provides, "That before any Collector shall enter upon the duties of his office, he shall execute a bond for such amount as shall be prescribed by the Commissioner of Internal Revenue *under the direction of the Secretary of the Treasury*, with not less that five sureties, to be approved by the Solicitor of the Treasury. * * * * * And such Collector shall from time to time renew, strengthen and increase his official bond as *the Secretary of the Treasury may direct*, with such further conditions as the said Commissioner shall prescribe."

It is clear that under the law, as well as the instructions contained in the letter of the Commissioner, dated July 30, 1866, Soule was entitled to his Commission, upon the receipt by the Department of the bond dated Nov. 2d, 1866, and the act of the Commissioner in retaining this bond, and requiring a new one with different conditions without any directions from the Secretary of the Treasury, was contrary to law. The bond was therefore extorted from Soule under color of office. It was not voluntary. It is not an easy matter to obtain good sureties to cover the penal sum of $100,000. Soule would not have given the second bond, as he says himself, if he had not been directed to do so by the Commissioner, and supposed it had to be done. (Transcript pages 19-20.)

The bond having been thus extorted is void.

United States vs. *Tingey*, 5 Peters 115.

POINT V.

Having given one bond, Soule could not be required to give another, except *upon direction of the Seretary of the Treasury.*

It seems clear that the letter of *Thomas Harland, Deputy Commissioner*, was not the *direction* of the Secretary of the Treasury, and that the Court below erred in instructing the jury that it was.

The direction of the Secretary of the Treasury cannot be presumed.

United States vs. *Jonas*, 19 Wallace 604.

W. W. MORROW,
Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

SOULÉ ET ALS., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES.
} No. 295.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States

OCTOBER TERM, 1877.

SOULÉ ET ALS., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES. } No. 295.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

This was an action against the principal and sureties to an official bond given by a collector of internal revenue and executed January 12, 1867.

By their answer (folios 33, &c.) the defendant (1) made a *general denial* of the allegations in the complaint, and pleaded (2) that the bond was void because executed under *duress*, and (3), in effect, that its conditions had been *performed*.

The record shows that the following exceptions were made at the trial below:

1. That the *Treasury transcript* of the collector's account, which was the only evidence adduced by the United States to show the indebtedness, was inadmissi-

ble as evidence, because it had been audited, &c., *by the Fifth Auditor*, who had no authority therefor (folio 47).

2. To the allowance of the following item in such account: "Amount of gauger's fees collected in excess, form 108, $494.38," *because* it was for money received after the date of the passage of the *act imposing taxes on distilled spirits*, &c., *approved July* 20, 1868, and in pursuance of the fifty-third section of that act; the exception being that *because of the time at which it was received* the sureties to the bond could not be liable therefor (folio 47).

3. To an item in such account, as follows: "Amount of error by the assessor in footing lists (form 23), as per report of supervisor, $6,544.96:" on the ground that the transcript was not *prima-facie* evidence of such charge, either against the principal or against his sureties.

4. The fourth exception arose as follows:

Soulé, the collector, was appointed such March 28, 1865, to hold until the expiration of the next session of Congress. In July, 1866, whilst continuing to act as collector, he was, with the advice and consent of the Senate, appointed anew, and thereupon was duly advised thereof, and instructed to execute the blank bond then forwarded: upon the receipt and approval of which he would receive a commission. Accordingly a bond was executed and returned, but on examination by the Solicitor of the Treasury it was disapproved by the deputy commissioner of internal revenue *as being several, and not joint and several;* a new blank being at same time forwarded for execution. The bond disapproved of was dated November 2, 1866, and was and is still retained by the United States, and the defendant

has been charged thereupon by an account stated thereunder by the auditor, &c., which account ran from November 2, 1866, to January 12, 1867 (the date of the bond now sued upon). Soulé testified that he executed the bond sued upon because so instructed, and in order to get his commission, and that but to get such commission he would not have executed it; but that at the time he had made no objection to such execution, thinking it useless, and not knowing that the Commissioner of Internal Revenue had no power, unless directed by the Solicitor of the Treasury, to require the second bond. Upon these facts the court charged that the giving of the second bond was voluntary, and also that the direction given by the deputy commissioner must be considered as given by the Secretary.

In reply to the above objections, respectively, it seems:

1. That the Fifth Auditor was the proper officer to audit the account in question.

By the act of June 30, 1864, ch. 173, sec. 2 (13 Stat., 223) (see Revised Statutes, sec. 277, p. 46), it became the duty of the Fifth Auditor to *receive and examine and to certify balances upon the accounts rendered by the Commissioner of Internal Revenue of the public moneys received or paid out, or paid to the Treasurer of the United States, and of the vouchers exhibited therefor.* By section 33 of the same act (p. 236), *collectors were required, at the end of every month, to transmit to the Commissioner of Internal Revenue a statement of their collections, and to pay over monthly, &c., the moneys collected by them at such places as might be designated by the Commissioner.*

This shows that by the expression "the accounts rendered by the Commissioner of Internal Revenue" (above)

was meant accounts rendered in his department, and therefore that it included accounts like that of Soulé.

2. The second exception seems to be virtually overruled by the decision made by this court in Powell's case, 14 Wall., 493; and see also Singer's case, 15 Wall., 111.

3. As to the third exception, all that occurs to be said, in the absence of a brief for the plaintiffs in error, is that inasmuch as the lists of taxes, &c., placed by the assessor in the hands of the collector are necessary for understanding the accounts rendered by the latter, and so make part of the accounts of the Commissioner of Internal Revenue audited by the Fifth Auditor, the force of such exception is not readily perceived. Errors by assessors in footing lists must affect the general balance for or against collectors.

4. It seems plain that the act in question of the deputy commissioner is to be taken as virtually that of the Secretary of the Treasury (Dugan *v.* The United States, 3 Wheat., 172), and, if there were no such presumption, the circumstances stated in the bill of exceptions make no case of unlawful coercion (Hamilton *v.* Dillon, 21 Wall., p. 91, bottom, &c.). Besides this, laches on the part of officers of the United States (say, as suggested here folio 51, by acquiescing in an irregular official bond pending action for the correction thereof set on foot by the proper public authority and concurred in by the obligor) cannot affect the government for any purpose (United States *v.* Kirkpatrick, 9 Wheat., 735), even supposing (?) that under the circumstances of this case it could have prejudiced a *private* principal.

S. F. PHILLIPS,
Solicitor-General.

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Oct. 24. 18

PETITION

OF

ALVIN R. REED

TO THE

Supreme Court of the United States

FOR

WRIT OF HABEAS CORPUS

AND

WRIT OF CERTIORARI.

OCTOBER TERM, 1879.

GEO. S. BOUTWELL, *of Counsel for Petitioner.*

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1879.

To The Supreme Court.

UNITED STATES OF AMERICA.

The petition of Alvin R. Reed, of Medford, in the county of Middlesex and State of Massachusetts, respectfully shows: —

First. That on or about the twenty-sixth day of June, A. D. 1878, your petitioner was ordered to appear before a naval general court-martial convened by Rear Admiral Ed. T. Nichols, on board the U. S. ship "Essex," then stationed in the waters of Rio Janeiro, South America, to answer to certain charges and specifications of malfeasance in the discharge of his official duties as clerk to George L. Davis, then a paymaster in the navy of the United States.

Secondly. That in obedience to said order your petitioner appeared before said court-martial, and on the fifth day of July, A. D. 1878, pleaded not guilty to the several charges and specifications then made and read to him; and that thereupon, from day to day, the trial proceeded until the sixteenth day of July, A. D. 1878, when the said court-martial found him guilty of certain of the charges and specifications.

Thirdly. That on the said sixteenth day of July, A. D. 1878, the court passed sentence upon your petitioner, made a record thereof in their proceedings, and transmitted the sentence to Rear Admiral Nichols after the members of the court had affixed their signatures thereto.

Fourthly. That on the nineteeth day of July, A. D. 1878, Rear Admiral Nichols returned the said sentence to the president of the court-martial, with a communication in writing, in which the admiral says that the finding is in accordance with the evidence, but regrets to be compelled to differ with the court as to the adequacy of the sentence.

Fifthly. That on the twentieth day of July, A. D. 1878, the

court-martial proceeded to revise the sentence so returned, and adopted an order that the following sentence be placed on the record in substitution of the former sentence, which is hereby revoked: —

"That the said Alvin R. Reed, paymaster's clerk, U. S. Navy, be imprisoned in such place as the honorable Secretary of the Navy may designate for the term of two years; to lose all pay which may become due him during such confinement, excepting the sum of $10 per month, this loss amounting to $1,960; to be fined in the sum of $500, which fine must be paid before or at the end of the term of confinement. Should such fine not be paid at end of term of confinement, to be detained in confinement without pay until such fine be paid, and at the expiration of term of confinement to be dishonorably dismissed from the naval service of the United States."

W. S. Schley, *Commander U. S. N., President of Court.*
H. T. Stancliff, *Past Assistant Paymaster and member.*
Chas. H. Black, *Lieutenant and member.*
E. S. Houston, *Lieutenant and member.*
Asa Walker, *Lieutenant and member.*
W. P. Day, *Lieutenant and member.*
Robert L. Mead, *Captain U. S. M. C., Judge Advocate.*

Sixthly. That the second sentence, so imposed, was more severe upon your petitioner than the sentence passed upon him on the sixteenth day of July, A. D. 1878, and revoked by the court-martial as aforesaid.

Seventhly. And your petitioner further represents that in his capacity as paymaster's clerk, as aforesaid, he was not amenable to trial by court-martial, nor subject to the jurisdiction of said court.

Eighthly. That under said second sentence your petitioner has been for a long time, and now is confined on the U. S. ship "Wabash," at the navy yard, Boston, Mass., and under the custody of Capt. S. L. Breese, commander of said ship.

Ninthly. That on or about the twelfth day of April, A. D. 1879, your petitioner presented his petition to the Hon. John Lowell, Circuit Judge of the United States in the first circuit, praying for a writ of *habeas corpus;* that a hearing thereupon was had before the Hon. Thomas L. Nelson, Judge of the District Court, sitting in the

said Circuit Court, and such proceedings were thereon had, that on the twelfth day of June, A. D. 1879, the said Circuit Court, to which said writ was returnable, remanded your petitioner and discharged said writ.

And your petitioner now is, and ever since the said twelfth day of June, A. D. 1879, has been a prisoner confined on said ship, at the navy yard, at said Boston, in the custody of said S. L. Breese, under the said illegal sentence pronounced on him on the said twentieth day of July, A. D. 1878, and restrained of his liberty in violation of the Constitution of the United States and of the laws of the country.

Wherefore your petitioner prays that a writ of *habeas corpus* issue directed to the said S. L. Breese, commander of the said ship "Wabash," commanding him to produce your petitioner before this honorable Court, at the city of Washington, at such time as the Court shall direct, and that he then and there show the cause of your petitioner's detention, to the end that your petitioner may be discharged from custody.

And your petitioner also prays that a writ of *certiorari* may issue to John G. Stetson, clerk of the U. S. Circuit Court for the District of Massachusetts, commanding him to certify to your honorable Court the petition of your petitioner before referred to, the return thereto, and all the records of said court respecting the same, and the adjudication thereon, to the end that the errors therein may be corrected by this honorable Court.

And your petitioner will ever pray.

ALVIN R. REED.

Dated BOSTON, Sept. 3, 1879.

DISTRICT OF MASSACHUSETTS, ss.

Alvin R. Reed, being duly sworn, says that he has read the foregoing petition, and that the same is true of his own knowledge, except as to matters stated on information and belief, and as to those matters he believes it to be true.

Sworn before me, HENRY A. WALKER, this third day of September, 1879.

[SEAL]

Notary Public.

Supreme Court of the United States.

October Term, 1879.

IN THE MATTER OF THE PETITION

OF

ALVIN R. REED

FOR

WRIT OF HABEAS CORPUS AND WRIT OF CERTIORARI.

STATEMENT OF FACTS,

AND OPINION OF NELSON, J.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1879.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

ALVIN R. REED, *Petitioner for Habeas Corpus.*

STATEMENT OF THE CASE.

Alvin R. Reed, the petitioner, on the 14th of April, 1879, filed his petition, duly signed and sworn to, in the Circuit Court, addressed to Judge Lowell, circuit judge, in which he complains that he is unlawfully imprisoned in the United States ship "Wabash," now in the harbor of Boston, and at the navy yard in said Boston, by Captain S. L. Breese, the officer in command of the said "Wabash," and avers that the said S. L. Breese claims to restrain him of his liberty, as he is informed and believes, by virtue of a certain paper or sentence purporting to be a sentence made by a naval court martial, or by virtue of an order or warrant issued by the Secretary of the Navy of the United States based on said sentence, which sentence, as he is informed and believes, is null and void and without authority in law, and in violation of his constitutional rights as a citizen of the United States, as will more fully appear from the record of the proceedings of the said court martial, a copy of which, including a copy of said pretended sentence, is annexed to the petition. Wherefore, he prays that a writ of *habeas corpus* may issue and for other relief, that the complainant may obtain his liberty.

April 17, 1879, Captain Breese appeared in court in response to the writ, and produced the body of said Reed, and as to the cause of the taking and detaining said Reed, answered that he held him under an order of the commandant of the navy yard at said Boston,

the said Reed being under the sentence of a naval general court martial.

At the hearing, which, in the absence of Judge Lowell on the circuit, was before Judge Nelson of the District Court, it appeared, and there was no dispute as to the facts, that June 26, 1878, Rear-Admiral Edward F. Nichols, commanding the United States naval force on the South Atlantic station, by virtue of the authority vested in him by Chap. 10, Sect. 1624, Art. 38 of the Revised Statutes of the United States, duly ordered a naval general court martial to convene on board the United States ship "Essex," at 10 o'clock, A. M., on Monday, July 1, 1878, or as soon thereafter as practicable, for the trial of Alvin R. Reed, paymaster's clerk, United States navy, and such other persons as may legally be brought before it. In the order he named seven officers to constitute the court, five of whom were empowered to act, and stated further that "no other officers than those detailed can be assembled without manifest injury to the service." The seven officers consisted of a commander, five lieutenants, and one passed assistant-paymaster. Captain Robert L. Meade of the U. S. Marine Corps was detailed as judge-advocate.

The court duly assembled at the time and place appointed. The accused was brought before the court, and being asked, replied that he had been furnished with a copy of the charges and specifications preferred against him, and that he had no exception or cause of challenge against the court, or any member thereof; and, thereupon, the judge-advocate and the members of the court were duly sworn, and, at the request of the accused, counsel that he named was assigned him. The charges and specifications were then read aloud in the presence and hearing of the accused. The court was then closed, and proceeded to consider the charges and specifications; and certain alleged errors therein were pointed out by the judge-advocate, which required the correction of the convening authority. The court, after discussion, decided that they should be sent back for correction, and it was then opened, and the accused was notified of its action, and an adjournment was had to the following day.

The court met July 2, according to adjournment. The judge-advocate handed to the court amended charges and specifications received from the convening authority. The court was cleared to

inspect them, and they were found to be legally and specifically drawn. The court was then reopened and the accused was asked by the judge-advocate if he had received a copy of the amended charges and specifications, and whether he was ready for trial, to which he replied that he had received them that morning, and respectfully asked until 10 o'clock the next morning to prepare himself for trial; which request was granted, and the court adjourned.

July 3, the court met pursuant to the adjournment. The judge-advocate called upon the accused to listen to the charges and specifications, which were then read aloud in his presence and hearing, and being called upon to plead thereto, he pleaded in bar of trial: —

First. — That all that he did was done by him in a clerical capacity, and while performing the duty assigned him by his superior and appointing officer, the pay inspector.

Second. — That the charges and specification were based upon the opinion of a court of inquiry, and that he was not subject to trial except upon charges and specifications preferred by his appointing officer, the pay inspector.

Third. — That the offences alleged are not cognizable by this court, but are offences against the general law of the land, and are exclusively cognizable by the ordinary courts of criminal jurisdiction on proceedings instituted by his appointing officer, the pay inspector.

Fourth. — That certain witnesses named are necessary to his defence, and that they are beyond the reach or control of the court, and that no list of witnesses who are to appear against him has been furnished him.

Fifth. — That the amended charges and specification contain a charge not included in the original charges and specification.

The court was cleared for deliberation upon said pleas. It was decided that each and all were invalid and that the trial must proceed; and the court was opened and its decision announced to the accused.

The accused then moved the court, in writing, subscribed and sworn to by him, that his trial be postponed, because of the absence of certain material witnesses for his defence, until such time as the said witnesses may be summoned, or the navy department be heard from on the subject. In this motion two witnesses were named, —

the pay inspector, before referred to, and the late fleet clerk, — as "the most important witnesses by whom I expect to disprove the charges. They are now in the United States and quite beyond the power or control of this court, and I make this application not to defeat the ends of justice, but to secure to myself that justice to which every accused person is entitled before the law, civil or military, the means of offering proof of innocence, which the absence of these witnesses deprives me of, and which absence arises through no fault of mine; but, if any fault thereby exists, it must be attributed to the convening authority."

"Another important witness towards disproving a part of the charges is W. D. Evans, a merchant of Montevideo, Uruguay, without whom I am deprived of most important testimony."

The court was cleared, the motion discussed and forwarded to the convening authority, endorsed as a reasonable request. The court was then reopened, and adjourned to "the day after to-morrow, July 5," having decided that the fourth day of July is a legal holiday.

Admiral Nichols, on the 3d of July, acknowledged to the president of the court the receipt of the request of the accused for the postponement of his trial, stated that the subject matter was of too grave importance to be hastily decided, requested the president to inform Mr. Reed that his request was under consideration, and directed the court to adjourn until the usual hour to-morrow.

The court met on the 4th of July, but there being no decision by the convening authority upon the request of the accused for postponement of the trial adjourned to July 5, when it met again, and the decision of Admiral Nichols, refusing the postponement, was received and read aloud in the presence and hearing of the accused. The reasons assigned for refusing the postponement were because the motion did not set forth sufficiently under the rules and regulations how the testimony was material; and further, so far as the evidence of the pay inspector was concerned, the report of the court of inquiry, upon which these charges against the accused were founded, showed that the pay inspector was the chief delinquent, and if he was called as a witness he could not give his testimony without criminating himself, and therefore could not be compelled to testify;

and besides, being a party in interest, he should not be permitted to testify. As to the testimony of the fleet clerk, the report of the court of inquiry did not implicate him to any extent, and therefore his testimony could not be material; and as to the testimony of the Montevideo merchant, he had no authority to compel his attendance.

The trial then proceeded on each week day until July 16, when, the testimony being finished, the accused read his defence, and the judge-advocate submitted the case without argument. During this period one of the members, a lieutenant, fell sick and was detached from the court.

There were two charges against the accused. The first charge was "violation of the fourteenth article of Articles for the Government of the United States Navy." Revised Statutes of the United States, p. 278. To this charge there were four specifications. The second charge, to which there was but one specification, was "paying money to members of the crew of the United States flag-ship 'Hartford,' without authority from his commanding officer and in violation of naval regulations."

The court was cleared for deliberation, and after full consideration found two of the specifications of the first charge proved in full, and the other two proved in part, and that the accused was guilty of the charge. As to the second charge, the court found the specification proved and the accused guilty of the charge. The court thereupon proceeded to sentence the accused to a "fine of $500 and imprisonment for one year in any prison or penitentiary designated by the Honorable Secretary of the Navy. If fine be unpaid at expiration of his imprisoment, to remain in such prison or penitentiary until such fine be paid to the government. At the expiration of his confinement to be dishonorably discharged the service of the United States. To lose all pay except $50 per month during said confinement."

The court then adjourned until July 17, when it met, all the members (six) being present, the record of the previous day was read and approved, and the members of the court signed the record of the proceedings, finding and sentence, which was then transmitted to the convening authority.

The record of the general court martial then proceeds to state:

"The president of the court here presented an order of the convoking authority detaching Passed Assistant Paymaster H. T. Stancliff, U. S. Navy, from further duty on the court, which was read aloud, and P. A. Paymaster H. T. Stancliff withdrew." Another officer, Ensign S. C. Lemley, detailed for the duty, took his seat as a member of the general court martial. The order of Admiral Nichols was as follows: —

"U. S. Flag Ship, 'Hartford,'
Rio De Janerio, Brazil, July 17, 1878.

"*Sir:* — Upon the completion of the trial of paymaster's clerk, A. H. Reed, U. S. Navy, you will regard yourself as detached from duty as a member of the court martial, convened on board the U. S. steamer, 'Essex.'

"Very respectfully,

"E. T. NICHOLS,
Rear-admiral U. S. N.,
Commanding U. S. Naval Force on S. A. Station."

"Passed assistant paymaster,
H. T. Stancliff, U. S. N.,
U. S. Steamer, 'Essex,' Rio De Janerio."

The court then proceeded with the trial of Philip Krug, second class boy, U. S. Navy, and afterwards with the trial of Philip Kincade, ship's cook, U. S. Navy, with which two trials the court was occupied the remainder of July 17, the whole of July 18 and 19, and part of July 20. The record of the court martial then goes on, under date of three o'clock P. M., Saturday, July 20. 1878, as follows: "The court having finished the trial of Philip Kincade, ship's cook, U. S. Navy, proceeded to revise the case of Alvin R. Reed, paymaster's clerk, U. S. Navy. Ensign, S. C. Lemley, U. S. Navy, not being a member of the court which tried A. R. Reed, withdrew temporarily from the court, and passed assistant paymaster, H. T. Stancliff, U. S. Navy, who was a member of said court, was called into court and took his seat.

"Whereupon the court was cleared, and the president produced and read aloud a letter from Rear-Admiral E. T. Nichols, U. S.

Navy, commanding U. S. Naval Force on South Atlantic Station, sending the record in the case of Alvin R. Reed, paymaster's clerk, U. S. Navy, back to the court for revision of sentence." The letter of Rear-Admiral Nichols was as follows: —

U. S. Flag Ship Hartford,
"Rio de Janeiro, Brazil, 19th July, 1878.

"*Sir*, —I have carefully examined the record of the court in the case of paymaster's clerk, Alvin R. Reed, U. S. N., and am of the opinion that the finding is in accordance with the evidence, but regret to be compelled to differ with the court as to the adequacy of the sentence. The court is respectfully referred to Art. LI., Sect. 1624, Title 15, Chap. 10, Revised Statutes, for its duty in passing sentence. In the case under consideration, the sentence awarded can scarcely be called 'a punishment adequate to the nature of the offence.' The fine imposed upon Mr. Reed is actually paid by the United States, for the court grants to him fifty dollars per month of his pay while in confinement. The sentence also provides that in case the fine is not paid at the expiration of the term of imprisonment, such imprisonment shall continue until the fine is paid. The clause in regard to loss of pay is as follows: 'To lose all pay except fifty dollars per month during said confinement.' Now what is implied by 'said confinement'? I think its clear meaning to be the confinement imposed by the court, viz., one year, and as much longer as he, Mr. Reed, chooses to decline paying the fine. It will thus be seen that the accused will continue to receive fifty dollars per month for an indefinite period. In this aspect of the case, the sentence can scarcely be considered as a punishment; indeed, it seems rather to be in the nature of a reward, but I cannot suppose that the court so intended, and I am compelled to return the case to give the court an opportunity of revision.

"If the court in awarding this lenient sentence did so on the ground that there were mitigating circumstances or that the accused was from any other circumstances entitled to merciful consideration, it erred against the law. Those members who held such opinions had it in their power, under the above referred to law, to place their opinions on the record, and make their appeal for clemency to

the revising authority *after* 'a punishment adequate to the nature of the offence' *had been awarded.*

"The court is also respectfully referred to the latter part of Sect. 248, p. 47, of 'Orders, Regulations and Instructions for the Administration of Law and Justice' for information in regard to forfeiture of pay.

"The record is herewith returned for revision.

"Very respectfully,

"ED. T. NICHOLS,
Rear Admiral U. S. N. Com. U. S. Naval Force on S. A. Station.

"Commander,
W. SCHLEY, U. S. N.,
President Naval General Court Martial
U. S. Steamer 'Essex.'"

The record then goes on to state that "The court then proceeded with the revision, and ordered the following sentence to be placed on the record in substitution for the former sentence, which is hereby revoked: — 'That the said Alvin R. Reed, paymaster's clerk in the U. S. Navy, be imprisoned in such place as the Honorable Secretary of the Navy may designate, for the term of two years; to lose all pay which may become due him during such confinement, except the sum of ten dollars per month, this loss amounting to one thousand nine hundred and sixty dollars; to be fined in the sum of five hundred dollars, which fine must be paid before or at end of term of confinement; to be detained in confinement without pay until such fine be paid, and at the expiration of term of confinement to be dishonorably discharged from the naval service of the United States."

This last sentence was duly signed by the six members of the court (including Past Assistant Paymaster Stancliff), and the judge-advocate, and to it was appended the following recommendation, signed by five members of the court, but not signed by the president of the court or the judge-advocate,— "We, the undersigned, members of the general court martial for the trial of paymaster's clerk Alvin R. Reed, U. S. Navy, would respectfully recommend him to the clemency of the revising power, on the ground that he has a wife

and young child at home, who, we believe, are entirely dependent upon him for support."

The court then adjourned until Monday, July 22, to enable the judge advocate to write up the record, at which time it met pursuant to the adjournment, and the members "proceeded to sign this the record of its revised sentence."

P. A. Paymaster H. T. Stancliff here withdrew, and Ensign S. C. Lemley, U. S. Navy, came into court and resumed his seat as a member. The record then states that "the court having finished all the business before it, then adjourned at 10.45 o'clock, A. M., to await the decision of the revising power.

Under date of July 24, 1878, Admiral Nichols, in reviewing the proceedings of the court and in considering the recommendation to clemency by some members of the court, declined, for reasons given at some length, to mitigate the sentence of the court or to recommend its mitigation, and concluded the record in Reed's case as follows: "The proceedings, finding and sentence are approved, and Mr. Reed will be sent to the United States by the first favorable opportunity," which he signed.

It was in evidence at the hearing on the *habeas corpus* that Mr. Reed was sent from the South Atlantic to Portsmouth, N. H., in a government vessel, and was thence transferred to the Charlestown Navy Yard by order of the Secretary of the Navy, and ordered to be confined temporarily on board the receiving-ship "Wabash," at that navy yard, at the present time under the command of the respondent, Capt. Breese.

There was also evidence showing that Reed was duly appointed paymaster's clerk, and was duly qualified and placed upon the muster rolls, and had served in that capacity.

OPINION OF JUDGE NELSON.

The following opinion was given by NELSON, J.: —

This is a petition for a writ of *habeas corpus* to Captain S. L. Breese, in command of the United States ship "Wabash," in Boston harbor, who holds the prisoner in custody under a sentence of a naval court martial. It appears by the return of the writ, and the other evidence, that a naval general court martial was convened on board the United States ship "Essex," in the harbor of Rio Janeiro, on the first day of July, 1878, by order of Rear-Admiral Edward T. Nichols, commanding the naval forces of the United States on the South Atlantic Station, for the trial of the prisoner, a paymaster's clerk in the navy, attached to and serving on board the flagship "Hartford," upon charges and specifications preferred against him for alleged violations of Article 14 of the Articles for the Government of the Navy. (U. S. R. Statutes, Sec. 1824, Article 14.) The prisoner was tried and found guilty of the offences charged against him, and was sentenced by the court to "a fine of five hundred dollars and imprisonment for one year in any prison or penitentiary designated by the honorable Secretary of the Navy; and if fine be unpaid at expiration of imprisonment, to remain in such prison or penitentiary until such fine be paid to the government; at the expiration of his confinement to be dishonorably discharged the service of the United States; to lose all pay except fifty dollars per month during such confinement." The record of the proceedings having been made up and transmitted to Rear-Admiral Nichols, that officer refused to confirm the sentence, and returned the record to the court for revision of sentence, and at the same time, by a letter addressed to the court, called attention to Sec. 1624, Article 51, of the Revised Statutes, which provides that "it shall be the duty of a court martial in all cases of conviction to adjudge a punishment adequate to the nature of the offence," and suggested that the sentence imposed was not sufficiently severe to meet the requirements of that article. The court thereupon proceeded to revise the case, revoked the former sentence, and in substitution therefor sentenced the pris-

oner to "be imprisoned in such place as the honorable Secretary of the Navy may designate for the term of two years, to lose all pay which may become due him during such confinement, excepting the sum of ten dollars a month, this loss amounting to one thousand nine hundred and sixty dollars; to be fined in the sum of five hundred dollars, which sum must be paid before or at the end of term of confinement; should such fine not be paid at end of term of confinement, to be detained in confinement without pay until such fine be paid, and at expiration of term of confinement to be dishonorably discharged from the service of the United States." The record was again forwarded to Rear-Admiral Nichols, and the new sentence was confirmed by him. The prisoner is now held in the custody of Captain Breese under this sentence.

The prisoner claims that the proceedings of the court martial are void, and his imprisonment under its sentence illegal for two reasons. The first reason assigned is, that as paymaster's clerk he was not in the naval service of the United States, within the meaning of Art. 14, of the Articles for the Government of the Navy, U. S. R. S., Sec. 1624, Art. 14, and therefore not liable to be tried by court martial upon the charges preferred against him. This point has been determined adversely to the prisoner by the United States District Court for the Eastern District of New York, *United States* v. *Bogart*, 3 Ben. 257, and by the Circuit Court of the United States for the Ninth Circuit, *Bogart's Case*, 2 Saw. 396.

Under the statutes providing for the organization of the navy, and the regulations for the government of the navy adopted by the Secretary of the Navy, paymaster's clerks form a part of the pay corps of the navy. They receive their appointment from the Secretary of the Navy or the commander of the vessel on which they serve. They are required to accept their appointment by letter, binding themselves to be subject to the laws and regulations for the government of the navy, and to the discipline of the vessel, and to serve until regularly discharged. Their compensation is fixed by the statutes relating to the navy, and is paid from the naval appropriations, and their names are entered upon the navy muster rolls and pay rolls. Their duties are performed on board vessels

of war or at naval stations, and relate to the administration of the funds of the navy department. In case of disability they are entitled to pensions as naval officers. In all essential particulars they belong to, and form a part of, the navy of the country, and must be regarded as subject to its rules and regulations.

For these reasons, which are the same given for the decisions of the court in the cases above cited, the conclusion upon the first point is that the prisoner was in the naval service of the United States within the meaning of Art. 14, and was liable to be tried, convicted, and sentenced by a naval general court martial. (U. S. R. S., Secs. 1376–1389, 1556, 4695.)

The second reason assigned is that Rear-Admiral Nichols had no authority to send back the proceedings to the court martial for revision of sentence, and consequently the second sentence was illegal.

It was said by Attorney General Legare in 1842, in an opinion reported in 4 Att. Gen. Opinions, 19, that, "in military courts martial, the power of the commander by whom they have been convened, to direct them, in the event of disapproval, to revise their sentence and reconsider the proceedings, has never been doubted; and is rested solely upon the ground that the sentences of such courts are not to be put in execution until approved by that commander"; and he decided in that case that the President might order a naval court martial to reconsider its judgment whenever, according to the statute, his previous sanction is necessary for the execution of the judgment. The same question was again under consideration by Attorney General Cushing in 1853, in the case of Captain Voorhees, and in an elaborate and exhaustive opinion, reported in 6 Att. Gen. Opinions, 201, the learned Attorney General shows beyond all question that by the well-settled principles of the military law, it is within the power of the authority appointing a court martial, both in the army and navy, before the court has actually been dissolved, to order the case back for revision of sentence. In that opinion, he says: "It is laid down as a thing not open to controversy, in all the books of military law, that the superior authority may order a court martial to reassemble to revise its proceedings

and sentence"; and "the power of ordering a case back to a court martial for revision, must be conceded as indubitably existing, both as to the army and the navy of the United States"; and his opinion is fully sustained by the numerous authorities upon military law which he cites. He shows that a revisal by court martial is not a case of new trial at the instance of the government, and until the sentence of the court is approved or disapproved, the case still remains *sub judice*. He clearly proves that the general rules of the military law have been adopted in this country, and are applicable to the proceedings of courts martial both in the army and navy. Indeed, it was conceded at the hearing by the learned counsel for the prisoner that the practice now complained of has prevailed both in the army and navy since the foundation of the government.

By the Act of July 14, 1862, Chap. 164, Sec. 5 (U. S. R. S., Sec. 1547), it is provided that "the orders, regulations, and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the navy department, subject, however, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States." Under the authority of this Act, certain "Orders, Regulations and Instructions for the Administration of Law and Justice in the United States Navy," were issued by the Secretary of the Navy in April, 1870, with the approval of the President, and have ever since been in force. They contain the following provisions: —

"SECT. 261. No sentence of a general court martial can be carried into execution until after the whole of the proceedings have been laid before the officer who appointed the court, or, according to the circumstances of the case, shall have been submitted, through the Secretary of the Navy, to the President of the United States for his confirmation and orders."

"SECT. 262. The authority who ordered the court is competent to direct it to reconsider its proceedings and sentence, for the purpose of correcting any mistake which may have been committed."

"SECT. 263. It is not in the power of the revising authority to compel a court to change its sentence, when, upon being recommended by him, they have refused to modify it, nor directly or

indirectly to enlarge the measure of punishment imposed by sentence of court martial."

"SECT. 264. The proceedings must be sent back for revision before the court shall have been dissolved."

The fifty-third article for the government of the navy is as follows: —

"ART. 53. No sentence of a court martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President. All other sentences of a general court martial may be carried into execution on confirmation of the commander of the fleet, or officer ordering the court."

A paymaster's clerk is neither a commissioned nor a warrant officer, but holds his position by appointment. The first sentence was disapproved by the commander of the fleet, and the proceedings were returned to the court martial before it was dissolved.

The proceedings of the court martial and the action of Rear-Admiral Nichols seem to have been in exact accordance with the statutes and regulations of the navy, and to be fully justified by the principles of military law, as well as by the well-settled usage of the army and navy departments of the government.

An order is to be entered discharging the writ and remanding the prisoner to the custody of Capt. S. L. Breese.

Ordered accordingly.

G. S. BOUTWELL, *for Prisoner.*

G. P. SANGER, *U. S. Att'y,*
for the United States.

In the Supreme Court of the United States.

October Term, 1879.

EX PARTE ALVIN R. REED,

PETITIONER

FOR

WRIT OF HABEAS CORPUS AND WRIT OF CERTIORARI

BRIEF FOR PETITIONER.

GEO. S. BOUTWELL, *Counsel for Petitioner.*

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1879.

STATEMENT.

The facts in the case are fully set forth in the petition of Reed, in the agreed statement by counsel, and in the opinion given by Hon. Thomas L. Nelson, judge of the District Court for the District of Massachusetts, who, sitting in the Circuit Court for the first circuit, heard the case on the original petition for a writ of *habeas corpus*, filed by said Reed in said Circuit Court.

BRIEF.

There are three points in the case: —

1. Has this court jurisdiction upon the petition of Reed?

2. Could the court martial lawfully take jurisdiction of the prisoner?

3. And if the court martial had jurisdiction, was the second sentence, imposed upon Reed on the 20th of July, 1878, a valid sentence, or were the powers of the court exhausted when, on the 17th of July, a sentence was imposed upon a judgment then found, and that sentence was signed, recorded, and transmitted to the admiral?

I.

1. The writ of *habeas corpus* was granted by the Circuit Court for the first circuit. That court was competent to issue the writ.

Rev. Stat., Sects. 721, 752, 754, 605, 763.
Ex parte McCardle, 6 Wall. 326.
Ex parte Yerger, 8 Wall. 85.
Ex parte Lange, 18 Wall. 164.
Ex parte Jackson, 96 U. S. 727.

2. The power of circuit courts to issue the writ of *habeas corpus* is not affected by the statute of March 4, 1875, Chap. 114, Sect. 5, nor by the statute of March 3, 1879, Chap. 176.

The privilege of the writ of *habeas corpus* is designed to secure

personal liberty, and the statutes of the country ought to be so construed as to give to the citizen the fullest opportunity for the enjoyment of the privilege; and as the justices and judges of the Circuit Court have had original jurisdiction from the organization of the government, they can now be deprived of it only by an explicit denial of jurisdiction in a statute framed and passed for that express purpose.

3. The proceeding by which this case is brought into this court is in the nature of an appeal, in which of course is included the power of *revision*.

The appellate jurisdiction of this court is derived from the Constitution, subject only to such exceptions and regulations as Congress may make.

Con., Art. 3, Sect. 2, Cl. 2.
Ex parte Vallandigham, 1 Wall. 251.

No exception has been made touching its appellate jurisdiction in matters pertaining to the issue of the writ of *habeas corpus* by the circuit courts, and with stronger reason than in ordinary cases of law and equity that jurisdiction remains.

Con., Art. 1, Sect. 9, Cl. 2.

Assuming that this court has appellate jurisdiction, the mode of appeal, in the absence of directions by statute, is that mode which is acceptable to this court.

A writ of error is but a method of appeal.

Con., Art. XII. of Amendments.
Cohens *v.* Virginia, 6 Wheaton, 264.

4. The prisoner is now in custody under an order of the Circuit Court.

Ex parte Yerger, 8 Wall. 102.

II.

It has been held in two cases that clerks of paymasters are of the naval force of the United States, and subject to the rules and articles (Rev. Stats., Sect. 1624) for the government of the navy.

In re Bogart, 2 Sawyer, 396.
In re Bogart, 3 Benedict, 327.

Not without great deference to those opinions, and to the arguments by which they are supported, do I venture to submit a view of the question which, in the absence of those opinions, I should urge with considerable confidence.

1. Courts martial are exceptional as to their organization, their jurisdiction, their modes of procedure, the rules by which verdicts are found or judgments reached, and therefore in ordinary judicial tribunals nothing is to be presumed in their favor.

In the case of Brooks *v.* Adams, 11 Pick. 442, Morton, J., said: —

"A court martial is a court of limited and special jurisdiction. It is called into existence for a special purpose and to perform a particular duty, and when the object of its creation is accomplished, it ceases to exist. The law will intend nothing in its favor. He who seeks to enforce its sentences, or to justify under its judgments, must set forth affirmatively and clearly all facts necessary to show that it was legally constituted and had jurisdiction."

In Dynes *v.* Hoover, 20 How. 82, this court said: —

"Courts martial derive their jurisdiction, and are regulated with us by an Act of Congress, in which the crimes which may be committed, the manner of charging the accused and of trial, and the punishments which may be inflicted, are expressed in terms."

Paymasters' clerks are only recognized indirectly in the chapter on the organization of the navy.

By the Revised Statutes, Sects. 1386, 1387, 1388, paymasters and assistant paymasters are allowed clerks under certain circumstances, and by Sect. 1556 their pay is fixed.

For the same reason, the admiral and vice-admiral are each allowed a secretary to aid in the discharge of their respective duties. (Rev. Stats., Sect. 1367.)

Sect. 1366 of the Revised Statutes provides that "the active list of the pay corps of the navy shall consist of thirteen pay directors, thirteen pay inspectors, fifty paymasters, thirty passed assistant paymasters, and twenty assistant paymasters."

Every paymaster, passed assistant paymaster, and assistant paymaster is required to give bonds for the faithful performance of his duties (Rev. Stats., Sect. 1383), but no such obligation is laid upon paymasters' clerks.

2. Paymasters' clerks are not officers holding either commission or warrants, nor are they deemed petty officers. (Rev. Stats., Sect 1410.)

Finally, if a reasonable doubt exists whether paymasters' clerks are of the naval force, the petitioner is entitled to the writ.

III.

1. There is no common law for the courts of law of the United States, and as the existence, jurisdiction and powers of courts martial are exceptional, with stronger reason it can be maintained that courts martial have no common law, and hence any reference to the usages or laws of Great Britain is inapplicable to the case at bar.

In the case of Wheaton *v.* Peters, 8 Pet. 591, Mr. Justice Story says : —

" It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made part of our federal system only by legislative adoption."

In one particular, by the statute of 1799, the common law of nations, which, for our purposes, was the law of Great Britain, was incorporated in the naval code of the United States; but that provision is superseded in the Revised Statutes, by Art. 22 of Sect. 1624. The old statute was in these words : —

" All faults, disorders and misdemeanors, which shall be committed on board any ship belonging to the United States, and which are not herein mentioned, shall be punished according to the laws and customs in such cases at sea." (Stat. at Large, Vol. .I p. 715, Stat. 1799, Chap. 24, Art. 46.)

But by the Revised Statutes, it is provided that

" All offences committed by persons belonging to the navy which are not specified in the foregoing articles, shall be punished as a court martial may direct." (Rev. Stat., Sect. 1624, Art. 22, p. 281.)

The adoption, however, of one common law rule by statute

excludes the idea that by virtue of the Constitution of the United States, the naval usages and laws of Great Britain became a part of our naval code.

As Reed was tried upon the charge that he was guilty of malfeasance and misdemeanors which are prohibited specifically in the rules and articles for the government of the navy, his case did not fall under Art. 22.

2. The statutes of the United States provide a system for the organization and conduct of naval courts martial, and their proceedings are valid only when those statutes are followed and obeyed. (Rev. Stat., Sect. 1624.)

3. As the case of the government is now understood by the counsel for the petitioner, the act of Rear-Admiral Nichols, in sending the sentence of the 17th of July to the court for revision, is justified under Art. 54 of Sect. 1624 of the Revised Statutes, and Sect. 262, of the rules and regulations for the administration of law and justice in the navy, as authorized or confirmed by Sect. 1547 of the Revised Statutes. The statutes and regulation referred to are as follows, viz. : —

"Every officer who is authorized to convene a court martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm." (Rev. Stat., Sect. 1624, Art. 54, p. 284.)

"The authority who ordered the court is competent to direct it to reconsider its proceedings and sentence, for the purpose of correcting any mistake which may have been committed." (Regulations for the Administration of Law and Justice in the U. S. Navy, 1870, Sect. 262, p. 49.)

"The orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the navy, subject to alterations adopted in the same manner." (Rev. Stats., Sect. 1547.)

The statute of July 14, 1862, Chap. 164, Sect. 5, v. 12, p. 565, provided, "That the orders, regulations and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the Navy Department, subject, how-

ever, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States."

The position of the government is not tenable, and for these reasons: —

a. If the regulation of the department had been enacted in a statute, in the precise words of the regulation, the admiral would have had no lawful authority for doing what was done.

He could then have directed the court to reconsider its sentence only for the purpose of correcting a mistake.

For judicial purposes, mistakes are of two sorts only, — mistakes in matter of law and mistakes in matter of fact.

Story's Eq. Jur., Sect. 110.

Upon the written statement of Rear-Admiral Nichols, what he alleged as having happened in the court was neither a mistake of law nor a mistake of fact, but only, in his opinion, an error of judgment, and that within the limits of the discretion conferred by law upon courts martial.

Statement of Facts, p. 7.

b. But if it were otherwise, and the regulation of the department were construed as giving the admiral authority to direct the court martial to reconsider its sentence for any reason that seemed to him sufficient, that regulation would be valid only so far as it conformed to the Constitution and laws of the country; and if in any respect it exceeded those limits, it would not bind even the officers and men of the navy, and with stronger reason it could not be invoked to deprive a citizen charged with crime of his right to be tried according to the laws of the country.

The authority and the limits of the authority of the officer convening a court martial to revise its proceedings are set forth in Art. 54 of Sect. 1624, Rev. Stats.

By that article, the convening officer in revising the sentence may confirm the sentence, he may remit the sentence, or he may mitigate the sentence; but no authority is given to him to increase the sentence, either directly or indirectly, or even to transmit it to any one for any purpose, except to his superior in office alone.

An officer or agent of the government takes nothing in his office except what is granted by the statute, and what is not so granted is withheld. Nor does the exception in this statute, that the convening officer may not commute the sentence, imply that he may do everything or anything else. The power to commute a sentence would not have been vested in him if the exception had not been made, but the reason for the exception is found in the possibility that the grant of power to mitigate or remit a sentence might have been construed, improvidently, as including the power to commute a sentence.

c. The sole power of revision was in the admiral himself, and the manner of its exercise was prescribed in Art. 54. When the court had signed and transmitted the sentence, its power over the sentence ended, and neither by any original action on its own part, nor by delegation from another, could that power be revived.

Upon the authorities already quoted, it is claimed on behalf of the petitioner, that when, on the 17th of July, the sentence of the court martial was made, signed by the several members, recorded, and transmitted to the admiral, not only were the powers of the court exhausted, but the court itself ceased to exist for any purpose whatever.

The action of the admiral was equivalent to a formal dissolution of the court.

Stancliff was withdrawn and assigned to other duty.

Ensign S. C. Lemley was made a member of the court by the order of the admiral.

Two persons, accused of different offences, were on the 17th, 18th, and 19th of July tried for those offences, and by a court differing in its *personnel* from the court that tried Reed.

In each of these cases an oath was, or should have been, administered anew to each member of the court. The form of the oath is conclusive upon this point: —

"I, A B, do swear that I will truly try, without prejudice or partiality, the case now depending, according to the evidence which shall come before the court, the rules for the government of the navy, and my own conscience." (Rev. Stats., Sect. 1624, Art. 40, p. 283.)

By the laws of Massachusetts, a similar oath is prescribed for members of courts martial: —

"You, A B, do swear, that without partiality, favor, fear, prejudice, or hope of reward, you will well and truly try the cause now before you, between the commonwealth and the person to be tried." (Rev. Stats. Mass., Chap. 12, Sect. 118, p. 131.)

In considering this oath, the Supreme Court of Massachusetts said, "It was apparent, from the form of the oath, that the members of the court martial should be sworn for each trial; that for every new complaint they must be considered as a new court, and must be newly organized." (7 Pick. 150, Coffin *v.* Wilbur.)

By Article 45, of the Articles for the Government of the Navy, it is assumed that the proceedings of a court martial end with the sentence. (Rev. Stats., Sect. 1624, p. 283.)

If the theory of the government be sound in law, this court martial, convened for the trial of men charged with crime, the members acting and being in the double capacity of judges and jurors, were at the same time engaged in the trial of three different parties, its own *personnel* of one sort in one case, and of a different sort in the two other cases, and yet always the same court.

On the other hand, we claim that a naval court martial has no terms; that it exists always and only for a particular case; that for each trial there is a new court and a new oath, whether the *personnel* of the court is changed or unchanged, and that its powers end with the sentence, duly signed, recorded and transmitted to the officer by whom the court was convened.

Nor have ordinary courts of law any greater powers.

In Archibald's Criminal Pleading, p. 679, it is said, "If, by inadvertence in passing sentence, a requirement of the statute has been overlooked, the court may correct the sentence at the same term and before the sheriff has proceeded to execute it."

And again, "A judgment pronounced by a Court of Oyer and Terminer, or jail delivery, may be altered or amended by the judge at any time during the same assizes; a judgment by a Court of Quarter Sessions may be altered at any time during the same sessions; and a judgment of the Court of Queen's Bench at any time during the same term, provided the sentence be not actually entered of record." (Page 689.)

See Note also.

This doctrine is supported in Chitty's Criminal Law, Vol. I. p. 721, where it is said, "In case of misdemeanors, it is clear the court may vacate the judgment passed before it becomes matter of record, and may mitigate or pass another, even when the latter is more severe. . . . And no court can make any alteration when once the judgment is solemnly entered on the record; but if any material defect appear on the face of it, the judgment may be reversed by writ of error."

In the case of *ex parte* Lange it was held by this Court that under our system the decisions of a court of law may be revised at any time during the term, subject, it is presumed, to the condition that no part of the sentence has been executed.

18 Wall. 167.

Our conclusions are, —

First. That the naval court martial, convened July 1, 1879, for the trial of Alvin R. Reed, and which, on the 17th of that month, passed sentence upon said Reed, signed and recorded the same and transmitted it to the admiral of the fleet, by whom the court was convened, had thus performed every duty which the law authorized or required; and that the members of said court were thereafter incapable utterly of lawfully doing any act or thing touching or affecting the rights or liberty of said Reed.

Secondly. That on the 22d of July, 1878, when the so-called sentence, whose validity is now under test, was pronounced and recorded, a legally constituted court martial for the trial of Alvin R. Reed did not exist.

Upon the view now presented the petitioner has been twice put in peril for the same offence, or he is now deprived of his liberty without due process of law, and in either case his imprisonment is contrary to the guaranty contained in Article V. of the Amendments to the Constitution of the United States.

Osborn *v.* Nicholson, 13 Wall. 662.

GEO. S. BOUTWELL,
of Counsel for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

EX PARTE ALVIN R. REED.—APPLICATION FOR HABEAS CORPUS.

BRIEF FOR UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

EX PARTE ALVIN R. REED.—APPLICATION FOR HABEAS CORPUS.

BRIEF FOR UNITED STATES.

The petitioner, Alvin R. Reed, who is in confinement on the United States ship Wabash, at the navy-yard at Boston, Mass., under the sentence of a naval court-martial, was appointed clerk to a paymaster in the Navy in July, 1877, and previous to the trial below-mentioned was serving in that capacity on board the United States ship Hartford, then on the South Atlantic station. (See Appendix, wherein certified copies of his appointment, acceptance, and oath are given.)

It appears by his petition that in June, 1878, while holding the position of paymaster's clerk as aforesaid, he was ordered to appear before a general court-martial convened by Rear-Admiral Nichols on board the United States ship Essex, then stationed in the waters of Rio Janeiro, South America, to answer certain charges and specifications of malfeasance in the discharge of his duties

as such clerk; that he appeared before said court, and, having put in a plea of not guilty, was tried and convicted; that thereupon, July 16, 1878, the court passed sentence on him, and transmitted the sentence with the proceedings to Rear-Admiral Nichols, by whom the court was convened; that on the 19th of July that officer returned the sentence to the president of the court-martial, "with a communication in writing in which the admiral says that the finding is in accordance with the evidence, but regrets to be compelled to differ with the court as to the adequacy of the sentence;" and that on the 20th of July, 1878, the court-martial proceeded to revise the sentence so returned, and revoked it, ordering the following sentence to be placed on the record in its stead:

"That the said Alvin R. Reed, paymaster's clerk United States Navy, be imprisoned, in such place as the honorable Secretary of the Navy may designate, for the term of two years; to lose all pay which may become due him during such confinement, excepting the sum of $10 per month, this loss amounting to $1,960; to be fined in the sum of $500, which fine must be paid before or at the end of the term of confinement. Should such fine not be paid at end of term of confinement, to be detained in confinement without pay until such fine be paid; and at the expiration of term of confinement to be dishonorably dismissed from the naval service of the United States."

It is averred in the petition that this sentence (which is the one under which he is now confined) is more severe upon the petitioner than was the original sentence. And the petitioner claims that he "was not amenable to trial by court-martial, nor subject to the jurisdiction of said court."

It also appears by the petition that in April, 1879, the petitioner applied for a *habeas corpus* to the circuit court

of the United States for the district of Massachusetts, and that afterwards, upon a hearing on the writ, he was remanded to the custody of the naval authorities and the writ dismissed.

He now asks this court for a *habeas corpus* and *certiorari* to the end that the action of the circuit court may be reviewed and he be discharged from custody.

Upon this application but two questions are presented, namely:

1. Whether the court-martial by which the petitioner was tried had jurisdiction over him.

2. Whether it had authority to pass the sentence under which the petitioner is confined.

I.

Among the powers conferred upon Congress by the Constitution (art. 1, sec. 8) are the following: "to provide and maintain a navy," and "to make rules for the government of the land and naval forces;" and the eighth amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land or naval forces." These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution, defining the judicial power of the United States. (Dynes *v.* Hoover, 20 How., 79.)

In the exercise of this power Congress has enacted certain articles for the government of the Navy. (See sec-

tion 1624, Revised Statutes.) These articles provide for the constitution of summary courts-martial and general courts-martial. The latter are provided for by articles 38, 39, and 40, and have cognizance of all offenses committed by persons "in the naval service" (art. 4 and 14) which are punishable under the provisions of said section.

In *ex parte* Milligan (4 Wall., 123) this court said: "The discipline necessary to the efficiency of the Army and Navy require other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts."

It is not claimed by the petitioner that the general court-martial which tried him was not convened according to law; nor that the offense with which he was charged was not cognizable thereby; nor that there was any irregularity in the proceedings before or at the trial. It must, therefore, be deemed that the court was competent to try him for the offense charged if he was amenable to court-martial jurisdiction, and that all its proceedings down to the sentence (which will be hereinafter separately considered) were regular.

The inquiry, then, is, was the petitioner (he being at the time clerk to a paymaster of a vessel belonging to the Navy) in the "naval service" of the United States within the meaning of the articles referred to? If so, the court-martial had jurisdiction over him.

Authority to appoint clerks to paymasters in the Navy is conferred by sections 1386 and 1388 of the Revised Statutes, subject to the restriction contained in section 1387.

The mode of their appointment is prescribed by the Navy Regulations. By section 1547 of the Revised Statutes, it is declared that "the orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations in the same manner." Regulations made pursuant to this provision have the force of law (Gratiot *v.* United States, 4 How., 80, 117.)

The Navy Regulations in force at the date of the petitioner's appointment, and now in force, were established by the Secretary of the Navy, with the approval of the President, August 7, 1876. On page 95, in paragraph 9, of these Regulations, will be found the following:

"No person will be appointed a secretary who is not twenty-one years of age, nor a clerk who is under eighteen. Officers who nominate secretaries or clerks will be responsible for their character and fitness. Every officer entitled to a secretary or clerk may nominate him; but the appointment or discharge of a clerk by any officer not in command is subject to the approval of the commanding officer; the latter, however, will not refuse his approval except for good and sufficient reasons, which he will state in writing to such officer. No secretary or clerk will be entered upon the muster-roll of any vessel, nor be entitled to any pay, until he shall have accepted his appointment by letter, in duplicate, *binding himself therein to be subject to the laws and regulations for the government of the Navy and the discipline of the vessel.* One of these letters is to be transmitted immediately to the department by the officer conferring the

appointment, together with the oath of allegiance; the other copy will be preserved by that officer. In the case of any clerk appointed by an officer not in command, the letter of acceptance sent to the department must bear the approval of the commanding officer. The acceptance of an appointment as secretary or clerk shall be understood as binding such person to serve with the officer who appointed him until regularly discharged."

This paragraph is applicable to persons who are appointed clerks to paymasters in the Navy; and it will be observed that by its provisions, upon acceptance of the appointment, such persons become "subject to the laws and regulations for the government of the Navy and the discipline of the vessel." They are thereupon entered upon the muster-roll of the ship as a part of its company, and placed under pay. (See Appendix, in which will be found the letter of acceptance of the petitioner, together with his oath.)

It thus appears that by the Regulations of the Navy, which form a part of the law of the naval service, the petitioner, as clerk to a paymaster in the Navy, was in that service in such wise as to be amenable to court-martial jurisdiction.

But his naval status, so to speak, is otherwise recognized by law. In section 1410, Revised Statutes, secretaries and clerks in the Navy are referred to as being "officers not holding commissions or warrants;" and but for the clause therein which excepts them they would be rated among the petty officers of the vessel, these not holding either commissions or warrants. So in the pension act of July 14, 1862 (12 Stat., 566), the first section whereof provides, "That if * * * any officer, warrant or petty officer, musician, seaman, ordinary seaman, flotilla-man, marine, *clerk*, landsman, pilot, or other per-

son *in the Navy* or Marine Corps," &c. Here a clerk in the naval service (including, of course, a paymaster's clerk) is clearly recognized as belonging to the Navy. (See, also, R. S., section 4695.)

In the Navy Regulations of 1865, clerks are enumerated among the staff-officers (see page 2, paragraph 5), and are given relative rank with midshipmen (page 3, paragraph 22).

The above view as to the status of the petitioner is in accordance with the ruling of the courts. (See U. States *vs.* Bogart, 3 Benedict, 257; *In re* Bogart, 2 Sawyer, 396.)

The first of these cases was an action brought by the United States against the defendant, who was a paymaster's clerk in the Navy, under the act of March 2, 1863, chap. 67. The jury, under objections by defendant, were instructed to bring in a verdict for $2,000, and, in addition, double the amount of damages sustained by the government, agreeably to the third section of that act; reserving for the opinion of the court the question of the applicability of that section to a person holding the position which the defendant did. The court (Judge Benedict) said:

"The defendant was shown to be a paymaster's clerk, regularly appointed as such, and at the time in question in actual service on board the national ship Vermont. In this capacity he had charge of certain funds of the United States, to be used by him in payment of seamen and other persons on the pay-rolls of the Navy, which he converted to his own use.

"Persons holding such positions are appointed by virtue of a statute providing for the organization of the Navy. They are required to wear the uniform of the Navy. They are upon the pay-rolls of the Navy, and

appointment, together with the oath of allegiance; the other copy will be preserved by that officer. In the case of any clerk appointed by an officer not in command, the letter of acceptance sent to the department must bear the approval of the commanding officer. The acceptance of an appointment as secretary or clerk shall be understood as binding such person to serve with the officer who appointed him until regularly discharged."

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"Persons holding such positions are appointed by virtue of a statute providing for the organization of the Navy. They are required to wear the uniform of the Navy. They are upon the pay-rolls of the Navy, and

visal is the case of a jury sent out by the court to reconsider its verdict. (8 Op., 205.)

Under section 262, above quoted, and according to approved practice, Rear-Admiral Nichols, by whom the court-martial which tried the petitioner was convened, had authority to return the proceedings for revisal; and the court, having reconsidered its sentence, was authorized to modify it or to adopt another in its stead. The fact that the sentence thus adopted, or as thus modified, was more severe than the original one could make no difference.

With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles prescribed for the government of the Army and Navy, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.

Dynes *v.* Hoover, 20 How., 82.

III.

When it appears from the petitioner's own showing in the petition that if brought before the court he would not be entitled to a discharge, the court will not issue the writ. (Sims' case, 7 Cush., 285.)

In *Ex parte* Milligan (4 Wall., 110) it is said that "the court can elect to waive the issuing of the writ and con-

sider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on which the case of Tobias Watkins (3 Pet., 193) turned was, whether, if the writ was issued, the petitioner would be remanded upon the case which he had made. The Chief Justice, in delivering the opinion of the court, said: 'The cause of imprisonment is shown as fully by the petitioner as it could appear on the return to the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison.'"

It is submitted that the petitioner in this case does not show sufficient *prima facie* ground for his discharge, and that his application for the writ of *habeas corpus* should accordingly be denied.

CHARLES DEVENS,
Attorney-General.

APPENDIX.

UNITED STATES NAVY DEPARTMENT,
Washington, D. C., October 22, 1879.

I hereby certify that the annexed are true copies, from the files of the department, of the appointment, acceptance, and oath of allegiance of Alvin R. Reed, as paymaster's clerk in the United States Navy.

JNO. W. HOGG,
Chief Clerk.

Be it known that John W. Hogg, whose name is signed to the above certificate, is now, and was at the time of so signing, chief clerk in the Navy Department, and that full faith and credit are due to all his official attestations as such.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this twenty-second day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

[SEAL.] R. W. THOMPSON,
Secretary of the Navy.

COMMANDANT'S OFFICE,
Navy Yard, Norfolk, Va., 27 July, 1877.

Forwarded by—

J. BLAKELEY CREIGHTON,
Commodore and Commandant.

U. S. F. S. HARTFORD,
Navy Y'd, Norfolk, Va., July 26, 1877.

SIR: I have the honor to enclose herewith the appointments of my clerks with their letters of acceptance and oaths duly executed.

Will you please issue the necessary orders, that they may receive mileage, and forward them to me at this place?

Very respectfully, your obt. ser'vt,

GEO. L. DAVIS,
Pay Inspector U. S. N.

Hon. RICHARD W. THOMPSON,
Secretary of the Navy, Washington, D. C.

Forwarded.

S. B. LUCE,
Captain Com'd'g.

NAVAL ASYLUM, PHILA.,
July 19, 1877.

SIR: Having been ordered to duty on board the U. S. S. Hartford, I hereby appoint you my clerk.

You will, as required by Navy Regulation, inform me in writing of your acceptance of this appointment, and also forward to me your oath of allegiance duly executed.

Report to the commanding officer and myself on the 26th of July, 1877, on board the Hartford at Norfolk, Va.

Respectfully,

GEO. L. DAVIS,
Pay Inspector U. S. Navy.

ALVIN R. REED,
Medford, Mass.

Approved.

S. B. LUCE,
Captain U. S. N., Com'dg.

MEDFORD, MASS., *July* 21, '77.

SIR: I hereby accept the appointment of pay clerk, issued by yourself to me on the 19th inst., and I do hereby bind myself to be subject to the laws and regulations for the government of the Navy and the discipline of the Navy.

Enclosed please find oath of allegiance duly executed as directed.

Respectfully,

ALVIN R. REED.

Pay Inspector GEO. L. DAVIS, U. S. N.

I, Alvin R. Reed, having been appointed a paymaster's clerk in the Navy of the United States, do solemnly swear to bear true allegiance to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whomsoever; and to observe and obey the orders of the President of the United States of America, and the orders of the officers appointed over me; and in all things to conform myself to the rules and regulations which now are or hereafter may be directed, and to the articles of war which may be enacted by Congress, for the better government of the Navy of the United States; and that I will support the Constitution of the United States.

ALVIN R. REED.

Sworn to and subscribed before me on board U. S. S. Hartford, this 26th day of July, 1877.

S. B. LUCE,
Captain U. S. N. Comd'g.

The annexed blanks are to be filled by all officers subscribing to the above oath.

State or Territory in which born.	State or Territory from which appointed.	State or Territ'y of which a citizen.	Date of birth.
Mass	Mass	Mass	June 15, 1843.

U. S. FLAG-SHIP HARTFORD,
Montevideo, Uruguay, 1st June, 1878.

SIR: I have the honor to transmit herewith enclosed letter of acceptance and oath of allegiance of Mr. Alvin R. Reed, appointed paymaster's clerk of this vessel.

Very respectfully your obt. serv't,
EUGENE H. HARRIS,
Acting Paymaster U. S. N.
and Fleet Paymaster of South Atlantic Station.

Hon. R. W. THOMPSON,
Secretary of the Navy, Washington D. C.

U. S. FLAG-SHIP HARTFORD.
Approved June 1st, 1878.
ED. T. NICHOLS,
Commander-in-Chief U. S. Naval Force
on South Atlantic Station.

U. S. F. S. HARTFORD (2d RATE),
June 1st, 1878.

SIR: I hereby accept the appointment of paymaster's clerk, issued by you to me this day, and I hereby bind myself to be subject to the laws and regulations of the Navy and the discipline of this ship, so long as this appointment may be in force.

Very respectfully, your ob'dt. serv't,
ALVIN R. REED.

Act'g Paymr. E. H. HARRIS, U. S. N.,
Fleet-Paymr. S. A. Station.

I do solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither

sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto. And I do further swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.

ALVIN R. REED. [SEAL.]

Sworn and subscribed to in the presence of—

EUGENE H. HARRIS,
Acting Paymaster U. S. N.
H. R. BEADLE,
Captain's Clerk U. S. N.

[Stamp: U. S. Ship Hartford.]

Be it remembered that on this first day of June, in the year of our Lord one thousand eight hundred and seventy-eight, before me, Purnell F. Harrington, a lieutenant commander in the United States Navy, and commanding officer of the United States Flag-Ship Hartford, second rate, personally appeared the above-named Alvin R. Reed, and executed the above oath.

P. F. HARRINGTON, [SEAL.]
Lieut. Commander U. S. N.,
Commanding U. S. Flag Ship Hartford.

[Stamp: U. S. Ship Hartford.]

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